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REPORTS
OF
CASES in EQUITY,
Argued and Decreed

In the COURTS of
CHANCERY and EXCHEQUER,

Chiefly in the Reign of
King **GEORGE I.**

To which are added,

Some Select Cases in *Equity*, Heard and
Determined in the Court of *Exchequer* in
Ireland.

WITH

Two Alphabetical TABLES;

The One of the Names of the CASES, the Other of the
PRINCIPAL MATTERS contained in these REPORTS.

Gillbert's Rep. -

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer, Esq;*) for *R. Gosling*, at the *Mitre and Crown* against *Fetter-Lane*,
and *D. Browne*, at the *Black Swan* without *Temple-Bar*. M,DCC,XXXIV.

3

REPORT

CASES IN FOLLY

Arguing and Dealing

CHANCERY and EXCHAMER



Some of the Cases in Folly, Dealing and
Determined in the Cases of Arguing and

TOOAL TAVLES

The Cases of the Cases in Folly, Dealing and
Determined in the Cases of Arguing and

1757

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Determined in the Cases of Arguing and

T H E

P R E F A C E.

ALTHOUGH this Collection of Reports of Cases in Equity appears in Publick without any Author's Name to recommend it, yet an attentive Reader will on a transient Perusal easily discover the original Root or Stock from whence it sprung; which 'tis conceived will manifest itself, not only by the frequent Repetition of the Author's Name throughout the Work, but also from that exact Method and consummate Learning and Judgment he has shewn in the Argument and Disquisition of divers curious Points, both at Common Law and in Equity, as they fell under Debate in the several Cases here reported. For,

1. As to the Author, the Reader will here find him to have been not only a constant Attendant on the several Courts of Equity in this Kingdom, but likewise an exact Observer, and an indefatigable Collector of such Arguments, Debates, Orders, Resolutions and Decisions, as most materially occurred both in the Chancery and Exchequer of England and the Exchequer of Ireland.

2. As to the Matter and Method of the Arguments produced in this Collection, we may Observe, That in such as relate to the Decision of Personal Rights, the Author generally deduces them from the like Decisions found in the Body of the Civil Law (viz. the Institutes, Pandects, and Novels of Justinian and other Emperors.) And as to Real Estates and Inheritances in Lands, he frequently takes his Rise from the antient Feudal Law; and having shewn its Analogy with our antient Law of Tenures, from thence deduces it through all its various Changes and Alterations down to our own Times; and lastly, delivers his own Judgment and Opinion on the Whole, and that usually supported with such clear and undeniable Reasons, and such Strength of Authorities, as evidently demonstrate the Points in Question.

See the Case
of Russel and
Jennings, &c.

The PREFACE.

'Tis true, some Cases are here reported which are also found in other Books; as also some others which were argued and debated in a Neighbouring Kingdom. But as to the former, whoever will compare the Cases reported in this Collection with the same Cases reported by others, he will here find not only a fuller and clearer State of the Case, but likewise a more just and rational Account both of the Debates and Arguments at the Bar, and of the Decisions and Decrees of the Court than elsewhere. And as to the latter (i. e. the Irish Cases) it will appear, that those Cases, with the Arguments, and Determinations made thereupon, are of such a Nature, Weight, and Importance as to be of singular Use and Direction to all Practicers in the Courts of Common Law and Equity within this Kingdom.

What remains is only to Advertise the Reader that some few Erratas having escaped the Press, He is desired to Correct these, viz. Page 80, Line 24, for Case read Law. Page 83, Line 39, for Trespas read Process. Page 144 is Misnumbered; and Ibid. in the Margin, for the last Release read Lease. And Page 255, in the Title of the Case, for Vil. read Vid. or rather Widow.

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Easter-

Easter-Term,

1706.

4 ANNÆ. In Chancery.

Lady Oxenden, against Sir James Oxenden.

THE Lady Oxenden sued her Husband by Bill here for Alimony, *propter Savitiam*, and had a Decree for 300 *l.* per *Ann.* out of a Trust Estate, which the Court laid hold of, as being under a Trust, and in their Possession. But the Lord Keeper doubted what to have done, had there been no such Trust Estate to have laid hold on; and said, he would give no Opinion, it not being the Case in Question; he said, the constant Practice in this Court was, to take Care of a Woman that had a Fortune, which her Husband could not come at, without the Assistance of this Court, (as in Case of a Legacy or a Trust, where she marry'd without having a suitable Settlement :) This Court wou'd before the Husband should have the Fortune, compel him to make a Provision for her. It was objected, that this Court had no Jurisdiction in the Case of Alimony; But Mr. Pooley said, (to which the Keeper agreed) That this was as proper, if not a properer Place than the Spiritual Court: For the Spiritual Court has only a consequential Jurisdiction for Alimony, always subsequent to a Separation, unless *promissu & expensis*, and a present Subsistence; but this Court has an original Jurisdiction, or at least a concurrent Jurisdiction with the Spiritual Court, as in the Cases of Legacies, Probats, &c. But the Lord Keeper said, this Court could neither separate a *Mensa & Thoro*, nor a *Vinculo*; these being Matters meerly spiritual. See 1 *Chanc. Rep.* 250, 251. The Case of *Whorewood ver. Whorewood*. It was held in Chancery, That if a Deed is made of an Estate with a Power of Revocation, and after 'tis revok'd, he to whom the Inheritance belongs, may by Bill here, compel such Deed to be delivered up to him to whom the Estate belongs, to be cancell'd, because the Deed of Revocation may be lost, and then 'tis unreasonable the other Deed should be standing out.

B

Earl

A Bill of
Peace, and to
stay Suits at
Law, &c.
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Alimony and
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of a Trust
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1 Vern.
201. S. C.

A Mortgage
in Fee, de-
creed to the
Heir of the
Wife, and
not to the
Husband, or
Administration.

Earl of Bath, *versus* Sherwin.

A Bill of
Peace, and to
stay Suits at
Law, &c.
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Cases 17.
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1 Chanc.
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Note this
Censure.

THE Case was no more than this. A Bill was brought for a perpetual Injunction, to stay the Defendant from bringing any more Ejectments, to try his Title at Law, suggesting, that the Plaintiff had had five Verdicts, and that 'twas an unreasonable Vexation, &c. Therefore to put this Title in *perpetual Peace*, was the Prayer of the Bill. The Lord Keeper, after this Case had been fully debated, took Time to consider of it, and now this Term he delivered his Opinion, *viz.* That to give this Court an original Jurisdiction, there ought to be a *Fraud* or a *Trust*, or some *Accident* to fall out in the Case, or to prevent some general Inconvenience, as between the Lord of a Manor and the Tenants, to settle their several Rights; if in Case the Right between the Lord and the several Tenants was to be settled by separate Actions, the Difficulty upon the Lord would be insuperable, by Reason of the Multiplicity of Suits at Law. The like in settling Buttings and Boundaries, &c. Therefore this Court will interpose, and direct an Issue to be try'd, which when try'd, and the Conscience of the Court thereby informed and satisfy'd, this Court will then put the whole in Peace by a perpetual Injunction: But this Case the Keeper thought was in its Nature new, and did not fall under the general Notion of a Bill of Peace, this being only betwixt *A.* and *B.* and one Man is able to contend against another; 'twas true (he said) he thought it but a Notion of the Courts at Law, in Cases of Ejectments, to allow a former Verdict to be given in Evidence in a Tryal of another Man's Property, which is the Notion they go upon to grant a new Trial, because there being a fresh Demise, they say, this is a new Lease which has never been tried before; but then, why should they suffer another Verdict to be given in Evidence in another Cause? Why don't they allow it to be pleaded in Bar? He said, he was very well satisfy'd of the Vexatiousness of the Defendant in this Case, but then he said, the Law was clear in this Point, and Costs would attend the Event of such Trials: And if this Case was a Grievance in the Law, 'twas proper for another Jurisdiction, *viz.* in Parliament, especially since Parliaments are so frequent; so that it would be a Piece of Arrogance in him, to take upon him the Reformation of the Law, though it needed it.

Noyes & ux' *versus* Mordant, &c.

2 Vernon,
581. S. C.

A Mortgage
in Fee, de-
creed to the
Heir of the
Wife, and
not to the
Husband, or
Administrator, &c.

THE Case was thus, *A.* being in long Possession of an Estate that was a Mortgage in Fee, by his Will devises it to his Daughters *B.* and *C.* and their Heirs, and dies. *B.* marries and dies. The Question was, whether the Share of *B.* should be deemed a Real or Personal Estate,

See 1 Vern. 271, 298, 471. 2 Vern. 67, 20, 21, 227. Note 2 Vern, 520. 1 Salk. 154.

Estate, and consequently, whether it should descend to her Heir, or be decreed to her Husband as her Administrator. But 'twas decreed against the Husband, to the Heir of the Wife, and the Lord Keeper put this Case: A Man seized of Lands in Fee, which were only mortgaged to him, he by his Will devises all those Lands to his Son and his Heirs, and expresses himself in his Will thus; That they shall go as an Inheritance; surely the Heir, if this Mortgage be paid off, shall receive the Money, and not the Executor: For the Father who had the governing Power over the Estate, may dispose of it as an Inheritance, so long as it can continue so; and the Money, when paid off, shall go as he intended the Land; but Note, this is when the Disposition is in his own Family, and when his Intent appears plain by the express Words of the Will: For though the Will cannot absolutely pass a Fee, yet as much as can pass shall pass, and so it is in all Cases where a Man has Children, *viz.* Daughters, and has a full Power to dispose of his Estate amongst his Children, and he by his Will disposes of it to them: But suppose it happens that what he gives to one Daughter he was only Tenant in Tail of, and the rest which he gives to his other Daughters, he was Tenant in Fee of: Now inasmuch as the Fee Tail Land cannot pass by the Will, the rest of the Daughters shall lose a proportionable Part of their Land, to supply the Defect of the Will *quoad* that Daughter. For this is in the Nature of a necessary imply'd Condition, *viz.* That all of them should enjoy what their Father intended them; for over the Fee Simple Land, he had an absolute Power, and it can't be intended, but that if the Father had thought that that Daughter could have taken nothing by his Will, he would have made his Will otherwise.

A. devises Land whereof he was Tenant in Tail, to B. his eldest Daughter, and he devises other Land whereof he was Tenant in Fee to C. his second Daughter, on Condition that C. release her Right in the Intail'd Lands to B. and afterwards by a Codicil, says, That if a third Daughter should be born, then all the Fee Simple Lands shall be equally divided betwixt C. and such third Daughter: Now although all the three Daughters shall at Law take their Proportion of the intail'd Lands, as Co-heirs in Tail, yet the eldest Daughter in Equity, shall have an Equivalent out of the Fee Simple Lands.

Lord Guernsey, versus Rodbridges.

IN the Lord Keeper Wright's Time, there was a Decree for a perpetual Injunction, to quiet the Possession of a Water-Course to the Plaintiff's House, through the Defendant's Ground, unless the Defendant, who was then an Infant, should shew Cause to the contrary, within six Months after his full Age. But he shewing no Cause, the Plaintiff apply'd to the Court, to confirm the Decree, and make it absolute. The Case appeared to be this. The Duke of Norfolk, from whom the Plaintiff purchas'd, was owner of *Alberry*, and had a Water-Course to his House, through the Defendant's Ground, which ran under Ground in Pots. The Defendant's Father being an Infant, the

Where a Decree shall bind an Infant. See 1 Vern. 332. 2 Vern. 224, 225. 1 Chan. c. 256.

Duke

Duke obtained a Lease of this Ground from the Guardian, 'till the Defendant's Father came of Age, and made a Cut through the Ground in a new Place, which he quietly enjoyed after the Defendant's Father came of Age, for 21 Years before he dy'd. The Plaintiff in his Bill suggested, and endeavoured to prove an Agreement, but that did not expressly appear.

However, 'twas urged, that it should be presumed; for, if an Owner of Ground stands by, and sees another build upon it, and says nothing, he shall be barred from ever recovering it. Q.

'Twas said on the other Side, that the Water-Course not being the same, there could be no Prescription, nor was there any Grant; and if there was a Parol Agreement, it should not bind the Inheritance.

Opinion and
Decree.

Lord Chancellor. Wherever a Parol Agreement is begun to be put in Execution, and intended to be continued, there though there be no Writing, yet this Court shall enforce the Execution thereof, notwithstanding the Statute of Frauds and Perjuries. In the Case of *Foxcroft* and —, there was no Writing, but only a Parol Lease of *Wildhouse* for a great Number of Years: But the Lessee having begun to build, he had his Bargain compleated, and for that very Reason, because at Common Law it might be within the Statute of Frauds; 'tis proper for the Jurisdiction of this Court rather than the Common Law. Mutual Benefit is an Evidence of an Agreement, as suppose two Men front a River, each has not his own Ground only, but the other's between him and the Water, so they cut through each other's Ground for Water, and this continues 20 Years, I will presume an Agreement. And in this Case, it appears by the Evidence, that there was a mutual Benefit, so he confirmed the Decree.

Statute of
Frauds, &c.

Where an
Answer of
an Infant
may be read
against him.

Note, in this Case, the *Chancellor* took no Notice of the Infancy of the Defendant's Father, when this Water-Course began; seeing after his full Age, he acquiesced under it 21 Years. But an Objection was made, that the Defendant's Answer by his Guardian when he was an Infant, should not be read in the Cause, and it was allowed regularly to be so held in all Courts; But in this Case, the Cause was brought to a Hearing at the Defendant's Request. — The Infant at his full Age, might (as the right Way is) have apply'd to the Court, and set forth how he is grieved by the Decree, and might have had Leave to amend or alter his Answer, or any Part of it, or put in a new one, but he not having done so, it shall be presumed, that he abides by that Answer; and so 'twas read against him.

Q. 1 Vern. 262
2 Vern. 305
306

There was in that Case of *Foxcroft* and — this Circumstance, that there were Leases drawn and intended to be executed, before the Lessor's Death, who then lay a dying; but the Execution of them was, by a Fraud in the Heir at Law, prevented.

Information by the Attorney-General, on the Behalf of the Master and Fellows of Sidney-College in Cambridge, against Barnes and his Wife.

DR. Johnson gave certain Freehold and Copyhold Lands to the Master and Fellows of *Sidney-College*, by his Will, which was found in a Drawer in his Closet after his Death, signed and sealed, and all wrote with his own Hand, but no Witnesses to it; but he made a Codicil, which was called a Codicil to be annexed to his last Will, and was attested by three or four Witnesses, as he lay on his Death-Bed, his Will not being then produced, but was in his Closet, as aforesaid; and this Will was proved as to his Personal Estate.

The Question was, that though this might not operate as a Will, yet it might operate as an Appointment by the Stat. of 43. *Eliz.* cap. 4. of charitable Uses; And 'twas urged, that as to Copyhold Lands, where they are surrendered to the Use of a Will, there the Will is but an Appointment; and if it have no Witnesses, 'tis well enough: So as to Freehold, devised by Will to a Charity, take the Will not as a Will, but as a Paper, signifying only, that he designed a Charity, and 'tis a sufficient Conveyance for that Purpose, though it would not be so in another Case. And *Hob.* 136. and the Case of *Thwaites* and *Dye*, first in this Court, and then in the House of Lords were cited. 'Twas likewise said, that the Statute of Frauds, does not make a Will not attested wholly void, but that it shall not operate as a Devise; it may operate otherwise, notwithstanding, as in the Case of a Surrender, and though a Codicil be not annex'd in Fact, yet the Law annexes it, as in the Case of a certain Nobleman (not named) but quoted by *Dobbins*, who made Codicils, and gave several of them to Servants, as Bequests, for them to produce at his Death, which they did, and they were all good.

'Twas urged on t'other Side, that this would be to disappoint the Statute of Frauds. That though this be called an Appointment, yet it so far remains a Will, as that it may be revoked; and if it be a Will, then the Statute lays hold on't.

There were two or three of these Writings or Wills, besides this, in the same Closet. So that if this is an Appointment, then the first is good; if a Will then the last published is good, and the first dated may be last published. It differs from a Settlement to such Uses, as by his Will he shall appoint; for there the Will don't pass the Estate, but is only a bare Nomination, as in Case of Surrenders.

Lord Chancellor. As to the Cases cited, the Charity of Judges have carry'd them too far, perhaps, in Cases of this Nature. But by the Statute, Wills not so and so circumstanced, shall be void to all Intents and Purposes. Now if this be good as an Appointment, then 'tis not void to all Intents, &c.

I shall be very loth to break in upon the Statute of Frauds, and there is no Instance where Men are so easily imposed upon, as at the

C

Time

S. C. 2 vern.
597.
Where a Will
is void, it
can't operate
as an Ap-
pointment.
See Stat. 29.
c. 2. c. 4.
See 2 Chanc.
c. 109.
2 Vern. 493.
3 Mod. 263.
2 Vern. 498.

Time of their dying, under the Pretence of Charity; and there's no Precedent of this Kind since the Statute (tho' the *Attorney General* said he could produce one, which he was desired to do, and to give a Copy on't to the other Side.) The *Chancellor* said, he'd take Time to give his Judgment; but he seem'd to incline very strongly against the Distinction of operating by Will or Appointment, which he said the Makers of the Statute never thought of.

Note, 'Twas said by the *Chancellor*, for the Information, that the Statute 43 *Eliz. Cap. 4.* does by those Words *Limitation* and *Appointment*, repeal the Statute *de Donis*, as to this Case, which the Counsel of the other Side agreed to, tho' there were no Fine or Recovery.

Vane *versus* his Father Lord Barnard.

Q. 2 Vern. 101.
597. but not
the same
Point. See
1 Salk. 161.
Marriage Ar-
ticles a Cove-
nant to Co-
venant, &c.

730.
LORD Barnard, for the Advancement of the Plaintiff, a younger Son, in Marriage with Sir — Jolliff's Daughter, enters into Articles with Sir — Jolliff, to this Effect: Sir — Jolliff covenants and agrees *inter al'* to settle Lands free from Incumbrances, according to the usual Limitations in Marriage Settlements; and in Consideration thereof, the Lord B. covenants and agrees to settle Lands by Name, of the Value of 2000 *l. per Ann.* (but with a Life or two upon them) upon Trustees to like Uses; but with these Words: *That in such Settlement there shall be Covenants, that he is seized in Fee, has good Right to convey, and that the Trustees shall enjoy free from Incumbrances.* It happened, that these Lands were charged by my Lord B's own Marriage Settlement with 6500 *l.* to be paid to such Daughter or Daughters as should be living at my Lord's Death, and not provided for. The Bill was to have a Specifick Performance of the Articles by my Lord's paying off, or otherwise giving collateral Security against this contingent Portion of 6500 *l.* He having then one Daughter about 16 Years old. It was urged for the Plaintiff, that 'twas usual for this Court to decree a specifick Performance of Articles and Covenants, and not to depend only upon the uncertain Reparation by Damages, which the Personal Estate may perhaps not be able to satisfy; and this was not controverted, where 'twas possible to be done. But the Lord *Chancellor* held, That here was not any Covenant that the Lands were free from Incumbrances, but only a Covenant, that he would in the Settlement (which was after to be executed) covenant for that Purpose; so that the Parties seemed to be satisfy'd with a bare Covenant only; and the Marriage Articles were only a *Covenant to covenant*: So that inserting that Covenant in the future Settlement, was a specifick Performance of those Articles, and was all that my Lord agreed to do, or that the Plaintiff by his Bill desired to have.

Notice where
material.

My Lord *Chancellor* said, Notice or no Notice of this Incumbrance was very material in this Case: For where a Covenant is in this Manner, if any Incumbrance is discover'd between the executing the Articles, and the sealing the Deed of Settlement, whereof the Party

Party had no Notice, that Incumbrance shall be discharged, even before sealing the Deed of Settlement, both upon Account of the Fraud in concealing such Incumbrance, and because it would be needless to enter into a Covenant, which before entering into, is already known to be broke; but against all other Incumbrances discovered afterwards, there is the Party's Covenant only. Now where you have Notice of an Incumbrance before executing the Articles, 'tis a stronger Case than the last; for you Consent with your Eyes open, to accept the Party's Covenant against an Incumbrance you were aware of; and when you have chosen your Method of Security yourself, this Court will give no other, nor make the Party do a further Act, than by the Articles he has agreed to do; and the rather in this Case, for that the Portion is not a certain Incumbrance, but a Contingent one; and therefore 'tis reasonable to suppose, that my Lord *Barnard* would not be compelled to charge his remaining Estate at all Hazards, to secure against an Incumbrance, that was but contingent to the Prejudice of his eldest Son; especially when he had provided for the younger Son so plentifully; and decreed, that my Lord *Barnard* should execute a Deed of Settlement, with Covenants exactly pursuant to the Articles only; but because the Estate was subject to a present Charge, viz. to the Payment of a yearly Sum for the Daughter's Maintenance from her Birth; therefore, that the Lord *Barnard* should pay and discharge all Arrears of that, and the growing Annuity, as it shall arise, taking Acquittances from his Daughter, and leaving them with the Plaintiff for his Security.

'Twas strongly urged by Mr. *Vernon*, that supposing these Articles were but a Covenant to covenant; yet as soon as the Articles were performed, by sealing the Deed of Settlement, then they might come the next Day and exhibit their Bill, to enforce an Execution specifically of the Covenant in such Deed of Settlement: And why may not the Court Decree that to be done now, as well as that, which after Performance of this Decree, they will immediately Decree upon a new Bill. Lord *Chancellor* said, in this Case they could not, for the Incumbrance was not necessary, but contingent. And if you brought an Action at Law upon such a Covenant, you should not recover two Pence Damages, 'till a Breach, which possibly may never happen: Besides, the Covenant in the Deed of Settlement is not to be, that the Estate is free from Incumbrances; but that the Trustees shall enjoy free from Incumbrances, which so long as they do, the Covenant is not broke. And it seems, the Portion being contingent, and not certain, was the Reason of this Part of the Decree; because, 'tis plain, by the latter Part of the Decree, where the Incumbrance was certain (viz. the Payment of a yearly Sum) the Lord *Barnard* was decreed immediately to discharge it; tho' by the Articles he did but covenant to covenant, as is aforesaid, and there's no other Difference between those two Matters.

In controverting the Point of Notice in this Case, it appeared, that Sir *Edward Northey* was employ'd as Counsel by the Plaintiff and *Jolliff*, and had Notice, as he owned; but afterwards, he not being

What Notice
to a Counsel
of an Incum-
brance shall
bind the
able Party.

able to dispatch it fast enough, the Matter was taken out of his Hands, and one Sir — was employ'd, who drew the Writing, and finish'd the Matter, and no Proof was made that he had any Notice of this Incumbrance. Whereupon, the Question was, Whether Notice to a Counsel, or Agent, that is once employ'd, and goes not thro' with the Business shall be Notice to the Party himself; for 'twas allow'd of all Hands, that if he goes through, Notice to Counsel, Attorney, Scrivener, or any other Agent, is sufficient Notice to the Party himself. The Chancellor was in Doubt, but another Proof of Notice accidentally being discovered, this Matter was not determined: For it appear'd, that in these Articles Notice was taken of my Lady Barnard's Jointure in these very Lands, which necessarily leads to the Deed, whereby that Jointure is made; and in that Deed there was this Portion charged upon the Lands; and whatever is contain'd in a Deed, to which any other necessarily leads you, you are presumed to know, which was allowed without a Word more, *quod Mirum*.

Note.

Note, The Difference between a present Covenant, that Lands are free from Incumbrance; and that a Man shall execute a Deed with Covenant, that the Lands are free. And between a Covenant, that Lands are free, and that the Trustees shall enjoy the Lands free.

Mapletoft *versus* Mapletoft & Clerk.

A Surrender of Copyhold Lands, on Condition, &c. where Equity will not supply a defective Surrender in favour of a Wife, &c. against the Heir. See 1 Salk. 187. 1 Vern. 132. 2 Ver. 585. 680. and N.B. The Cases in the Chancery Abridgment, 124.

Richard Mapletoft the Plaintiff's Brother, surrenders Copyhold Lands worth 200 l. a Year (but subject to a Rent Charge of 52 l. a Year) to the Use of himself and his Wife, for their Lives, and the Life of the longer Liver of them, Remainder to his own right Heirs. The Bill was to set aside this Surrender. It appear'd upon the Proofs, that Richard, at the Time of the Surrender was so very ill, that he was not expected to live many Days; and upon surrendering into the Hands of the two Customary Tenants, He declared, that he made that Surrender, *upon Condition, that if he recover'd*, then the Surrender should be returned to him again, and his Wife should only have 100 l. a Year out of it. Soon afterwards he grew better (tho' he never recovered) and demanded the Surrender back again, but 'twas refused; whereupon he left his Wife in great Concern, and made a second Surrender of 100 l. a Year only to his Wife for Life, and soon after died. The Defendants gave Evidence of his great Love to his Wife, and several Declarations, that he had rather his Wife should have his Estate than any of his Relations; and insisted, that by *the Condition, if he recovered*, was intended, if he lived to be quite well again. But the Lord Chancellor declared his Opinion to be, That by the Words, *if he recovered*, were only meant, if he grew so well as to be able to settle his Estate better than his Weakness at that Time would give him Leave; and that the Surrender of the whole was but a provisional Security for the Wife, and he intended to give her all, only in Case he could not live to settle his Affairs better; and as for his Intention to give her all mentioned in the Proofs, 'twas plain, such Intention

did

did not continue 'till the Surrender, if any such there ever was. For 'twas agreed on all Hands, the Surrender was conditional, and decreed accordingly; but looking upon the Surrender as a Security to the Wife for the 100 l. a Year, he decreed Costs to be paid out of the Estate, as where a Person comes to redeem, &c.

Note, Richard Mapletost in this Case had but an Estate Tail by his Grandfather's Will, with a Power to make a Wife a Jointure, which Power was not well executed; but because the Plaintiff in his Bill had offered to settle 100 l. a Year. The Court decreed accordingly.

Woodman *versus* Skuse.

THE Defendant coming home from *Blebbingly* Fair, finds the Plaintiff naked, and just going to Bed to his Wife; he thereupon gets a Note from him for 500 l. which was in *June*, afterwards in *August* the Plaintiff gives him a Judgment, and in *October* following surrenders Copyhold Lands to him by way of further Security. The Plaintiff brought his Bill to have the several Securities deliver'd up, alledging, a Contrivance to catch him in that Manner, that he was drunk, and did not know what he did; and that the Defendant with an Ax threatned to cut him in Pieces, so that he was under Terror; and that the Defendant himself had said in Company, that the Securities were for Money lent. The Lord Chancellor observed, there was no Proof at all of a Plot to catch the Plaintiff in this Manner, nor that he appeared to be so disordered or frightened; for he continued in the same Mind when he was in cool Blood, at the several Times of giving the three different Securities; and 'twas proved, that he join'd with the Defendant in giving out, that the Note was given for a bargain of Grass, so that he knew what he was about, and had a Mind to conceal it, (and further said) the Defendant's saying in Company, that 'twas for a Bargain of Grass, made the Plaintiff's Equity the worse; for 'twas a Sign the Defendant was so just as to keep it a Secret, which was certainly the Intention of the Bargain it should be. If a Jury in this Case had given Damages, this Court could not relieve: And why should it, when the Plaintiff himself has three Times given and ascertain'd Damages against himself? It shews he thought the Damages but reasonable; so dismiss'd the Bill, but without Costs; because the Defendant had bragged of his Bargain, which was a Sign he thought himself rather over-paid; and therefore the Chancellor said he would relieve against the Penalties.

A Bond, &c. made under Terror and Duress; but confirmed when at Liberty, decreed. See 1 Chan. R. 157. 2 Vern. 187. 252. 1 Vern. 98. 1 Chan. c. 102.

See 1 Chan. c. 283. *Nelf.* Chan. R. 437.

Terry *versus* Terry & Ragget.

A Trustee lending of his own Head, an Infant's Money to one that broke, must bear the Loss.

THE Bill was brought against the Defendant's Executors and Trustees, for the Plaintiff's Wife, during her Minority, to have an Account. It appeared upon the Proofs, that the Defendant *Terry* had, without the Consent of the other Trustee *Ragget*, lent 100*l.* of the Infant's Money to one *Fletcher*, (who was then looked upon as a solvent Person) upon his single Bond; and *Fletcher* afterwards broke. It was also urged for the Plaintiff, that they had with the Infant's Money, purchased a Copyhold Estate for the Infants, at a much higher Rate than it is worth: But it appeared by the Proofs, that the Estate lay contiguous to another of the Infant's, and was more valuable to her than any Body else: That it had before cost more than they gave for it; and that it was purchased at the Importunity of the Infant's Mother and Aunt, who both contributed one 3*l.* t'other 8*l.* toward the paying for it. It was likewise insisted on for the Plaintiff, that the Defendants had referred a Matter to Arbitration, where the Infant's Right to Land was concerned; but that appeared only to be a Dispute that arose, touching a Hedge which was supposed to be made crooked, and too much into a Neighbour's Land, which being referred, it was by award set straight, and about three Shillings spent upon the Arbitrators.

Where a Trustee may lay out the Infant's Money, in purchasing Lands, &c.

As to the first, the Lord *Chancellor* said, That for Example's Sake, the Trustee lending an Infant's Money in such Manner of his own Head, and upon a single Bond only, should be answerable to the Infant for the Money, and so the Decree was; but he seemed to make those Circumstances, and especially the latter, the Ground of his Decree; so that had Land Security been taken, or a Joint Bond of two or three more solvent Persons, the Loss must have been to the Infant, which I particularly observed.

As to the second, the Lord *Chancellor* confirmed the Purchase. And though Mr. *How* insisted, that Guardians or Trustees, without a Power given them for that Purpose, could in no Case change Money of an Infant's into Land, because they descended in a different Manner, one to the Heir, t'other to the Executor; and that in this Case, 'twas a Prejudice to the Husband, who, had it been Money, had been immediately upon the Marriage intitled to it; whereas now, if she dy'd before she came of Age, he would lose it; yet my Lord *Chancellor* said, 'twas true generally, Executors or Trustees without a Power, can't purchase Lands with an Infant's Money; yet where 'tis an honest Purchase, as this seems to be, and to the Infant's Advantage, by reason of the Contiguity, he would allow of such chopping and changing, especially when attended with the Circumstance of the Mother and Aunt's Desire. Besides, he observed that the Plaintiff's Wife was still under Age, And which Way could he tell whether she approved or disapproved? She had submitted her Will to her Husband, so could not make Choice if she were at Age, and he would not decree the Purchase nought, and let in the Husband to have the Money, when he had made no Settlement upon the Wife as was owned. Mr. *How* urged, that during the

Infancy, it might then be decreed to be Personal Estate, that so, if she dy'd under Age, the Husband might have it. But the *Chancellor* said, let him take his Chance, 'tis certain this Court may decree, that an Executor or Trustee shall purchase for an Infant, and whatever this Court can command to be done, without Doubt it can approve when done. Note.

Harris *versus* Horwell.

THE Case was: A Testator, after the making his Will, purchased an Estate, and having by his Will given all his Lands from his Heir at Law to his Nephew, and when he was a dying, he told his Heir at Law, that he would have him by no Means hinder his Nephew from enjoying it, though he had not by any Writing. declared the Trust for his Nephew and dies; and the Heir at Law suffers him to enjoy it 11 Years, and then pretends he thought the Lands had passed by the Will, as being purchased before the Will; but Lord *Chancellor* decreed, that this Case was out of the Statute of Frauds, and that the Heir letting him enjoy it so long, was an Execution of the Trust, and so out of the Statute. He cited the Case of *Leister and Foxcroft* in the House of Lords, that where a Parol building Lease was made of Ground, and when the Lessor was dying, he declared he thought he ought to have made a Lease in Writing. But the Heir told him, he should not discompose himself, for that he would supply it; whereby, and by other fraudulent Means, the Lessee was hindered from seeing the Lessor, and having it done accordingly; the Lords held this to be out of the Statute, and made it good to the Lessee; and though in this Case, no express Fraud was proved, yet here was that Possession for 11 Years, which is a strong Presumption, that the Heir at Law suffered it as an Execution of the Testator's Declaration. Lands purchased after a Will decreed to go pursuant to the Will, though no Trust declared.

If a Mortgagee afterwards get an absolute Deed, but suffers Possession, to go sometime contrary to it, it will again make it but a Mortgage; so if a Man has made his Will, and his Son Executor, and when he is dying, says he has a Mind to have his Wife Executrix, and the Son says, don't trouble yourself to alter it, for I will let her have the Surplus, and act as Executor. This Court will decree it accordingly. Note.

Carter Administrator of Mary Bletsoe his Wife, Plaintiff, *versus* Bletsoe & Al. Defendants.

MATTHEW Bletsoe by his Will, devises his Lands to his eldest Son Satterthwaite Bletsoe, and his Heirs; but it was his Will and Mind nevertheless, that he the said Satterthwaite and his Heirs, should pay out of the said Lands so devised to him, the Sum of 600 l. viz. to his Daughter Mary Bletsoe 200 l. at her Age of 21 Years; and to his Note.
S. C. 2 Vern. 617.
Devise of a Legacy to be paid at 21; the Legatee dying before 21, it never

vested. See 2 Vent. 342. 2 Salk. 415. 2 Chanc. 155. 2 Vern. 617, 673. Q. 1 Vern. 462.

his Son *John Bletsoe*, the Sum of 200 *l.* at his Age of 21 Years; and to *Matthew Bletsoe*, the Sum of 200 *l.* at his Age of 21 Years; and if it should please God to take away out of this Life his Son *Satterthwaite*, before he attained to the Age of 21 Years; then his Will was, that his Son *John Bletsoe* should not have his 200 *l.* set him, but it should be paid to his Daughter *Mary Bletsoe* and *Matthew Bletsoe*, to be added to their Portions; and he, the said *John*, to have all the Estate given to the said *Satterthwaite*; for his Will was, that he should have it to him and his Heirs, and for him to pay the 600 *l.* as was exprest in such his Will, and also to be allowed and paid out of his Lands to his Children for their Maintenance and Education 4 *l. per Ann.* for every 100 *l.* yearly, 'till they came to their several Ages of 21 Years, and until their several Portions were paid. *Satterthwaite* dy'd before his Age of 21 Years, and the Plaintiff marry'd *Mary*, and had two Children by her, and *Mary* dy'd two Months before her Age of 21; and the Question was, whether this was not a subsisting Charge upon the Land, and an Interest so vested in *Mary*, as to intitle the Plaintiff as her Administrator to the Legacies, though she dy'd under 21. 'Twas urged for the Plaintiff, that the Intent of the Will was for their Portions by the exprest Word Portions in the Will, and by the Civil Law, Portion is always construed to be for their Preferment in Marriage, and that may happen long before the Age of 21, as this Case was. And as for the 100 *l.* which fell to her upon *Satterthwaite's* Death, no Time was limited for Payment of that, therefore the Plaintiff ought to have a Decree at least *quoad* that 100 *l.* It was likewise further urged, that 4 *per Cent* being allotted, 'till they attained their Age of 21 Years was in the Nature of Interest, and therefore the Testator must intend this Device as a *Debitum in presenti*, though *Solvendum in futuro*, because Interest imports a Debt; but the Chancellor dismiss'd the Bill *quoad* both with Costs; because here were no Words in his Will, which vested any Interest in these Legacies before the Age of 21 Years, and as to the 100 *l.* to *Matthew*, he said, was to be governed by the other.

Hedges *versus* Hedges.

A Construc-
tion of
Wills, and of
the Custom
of London.
See this Case
imperfectly
reported.
2 Vern. 615.

SIR *William Hedges* being a Freeman of the City of London, and having Children by two Venters, and being desirous to make a Difference between them in point of Fortune, he had by his Will, given to two of them a specifick Legacy of a Bond for 3000 *l.* but being dubious whether it were more agreeable to his Intent and Meaning, to give it by his Will or by Act in his Life-Time, he thereupon sent for his Lawyer to consult with, and his Lawyer, through Unskilfulness, advised him to do it by Act executed in his Life-Time; whereupon a Line was by the Lawyer drawn over those Words in the Will, which gave the 3000 *l.* Legacy. And the Bond was altered, and a new Security given in the Name of Sir *James Bateman*, in Trust for those Children, and the Will newly published, and soon afterwards Sir *William Hedges* dy'd. And if these Children should have an equal Share of one Third of the

Estate with the other Children, and also retain to themselves the 3000 l. was the Question; 'twas urged to be the plainest intent of Sir William imaginable that they shou'd, and that it would be contrary to Equity that the Mistake of the Lawyer should frustrate so manifest an Intent, and the rather, because the Obliteration was done by the Lawyer, without Sir William's Directions; 'twas further urged, that rather than this should be construed as an Advancement of them in Sir William's Life-Time, so as to make them bring it into Hotchpot, if they would come in for a Distribution of the Third Part with the other Children, Equity ought to construe it as a Devise of so much out of the Freeman's Part, of which he had a Power, viz. the dead Man's Part, or else to construe it, as a Legacy *causa Mortis*.

But *per Cur.* This can't be construed as a Legacy *causa Mortis*. That is, where a Man lies in *Extremis*, or being surprized with Sickness, and not having an Opportunity of making his Will, but lest he should die before he could make it, he gives with his own Hands his Goods to his Friends about him; this, if he dies, shall operate as a Legacy, but if he recovers, then does the Property thereof revert to him; but in this Case, the Testator, Sir William acted deliberately, and made his Election, that they should take by a Gift in his Life-Time, and for that Purpose altered the Securities, and re-published his Will, and so determined, that they should not take it by his Will. My Lord said, he believed the Intent of Sir William was, as has been suggested. But if Men will deliberately lay down Premises, and from them draw false Conclusions, this Court has no Jurisdiction to set right such Mistakes. In this Case Sir William, by the Advancement of them in his Life-Time, thought they would, notwithstanding that, have shared equally with their other Brothers and Sisters; but it seems he and his Lawyer thereupon drew Conclusions contrary to the Law and Custom of London. But he said, that he would not compel them to throw their 3000 l. into Hotchpot, but leave them to their Election, according as they found the Value of the third Part. But if the third Part was of greater Value than to bring in 1500 l. apiece, that before they should come into any of that, they should bring their 3000 l. into Hotchpot.

Oxwith versus Plummer. Upon an Appeal from the Master of the Rolls Decree.

Upon the Marriage of his Son, makes a Feoffment of certain Freehold Lands, by the Name of such and such Farms, in Trust for the Son for Life, then for his intended Wife for Life, then to his first Son, &c. and for want of such Issue, in Trust for the right Heirs of the Son. It happened that eight Acres, part of one of these Farms, was Copyhold, and there was a Covenant in the Deed, that A. should surrender those eight Acres to the Uses as the Freehold Lands were therein limited. The Son's Wife dies without Issue, whereby the Trust of the Fee Simple was in the Son, who mortgages the Farm, whereof the eight Acres were Part, by the Name of such a Farm,

See this Case imperfectly reported.

2 Vern. 636.

Where a defective Surrender, &c. shall be made good, &c.

See 2 Chanc. R. 218.

2 Vern. 565, 609, 680, &c.

E e

with

with the general Words, all and singular the Lands and Tenements parcel thereof, or usually occupied therewith, &c. but does not mention the eight Acres of Copyhold by Name, nor is there any Covenant in the Mortgage-Deed to surrender them. The Son dies, and the Equity of Redemption descends to his Sister and Heir, who is foreclosed by Decree of this Court, and afterwards conveys the Equity of Redemption to the Mortgagee. A. the Father who made the Settlement being indebted to Plummer by Judgment, at the Request of his Daughter, the Sister and Heir of his Son, surrenders the eight Acres of Copyhold to Plummer, as a further Security; Plummer brings his Ejectment, and has Judgment for the eight Acres. The Mortgagee Defendant in Ejectment, brings his Bill to be relieved. 'Twas urged for the Plaintiff, that if *Cestuy que Trust* Mortgages Lands, and there is a Defect in the legal Conveyance, (as in this Case the Defect of a Surrender) yet that shall be supply'd in Equity; for, if afterwards the Trustee could, by any Conveyance by him made of his legal Interest, defeat the former Conveyance of the *Cestuy que Trust*, no Purchaser could be safe. And Mr. Pounceford cited two Cases, viz. One, where a Man makes a Feoffment in Fee, upon a valuable Consideration without Livery, then gives a Judgment to J. S. who gets Possession, yet the Want of Livery was supply'd. The other was the Case of *Taylor and Wheeler*. A Man seized of Copyhold Lands in Fee, makes a Mortgage of them and Covenants to surrender, but four or five Years past, and no Surrender is made, then the Mortgagor becomes a Bankrupt. The Creditors get Possession, by Virtue of a Statute, upon a Bill brought by the Mortgagee. This Chancellor decreed the Mortgagee to hold the Lands against the Assignees of the Commissioners of Bankrupt.

Lord Chancellor. In this Case, the Copyhold Lands were never by the Mortgage under any specific Lien, and if not, then this differs from the Cases quoted by Mr. Pounceford. It appears that the Settlement lay before the Counsel of the Mortgagee, because the Mortgage Deed recites it so, that he was not ignorant that part of the Lands were Copyhold. Now, Why should the Mortgagee not take a Covenant to surrender, unless 'twas thought the Freehold Lands were sufficient, and so never intended to pass the Copyhold? And I will not by such general Words, pass Lands against the Intention of the Parties. Suppose a Man grants a Farm by Name, and all his Lands, &c. usually held and occupied therewith; and it happens that some of these Lands are Copyhold, Will this be a Forfeiture? surely not. Where a Mortgagee recites a Settlement, in which the Copyhold Lands appear, and yet he takes no Care to get a Conveyance of them, nor so much as names them; I should hold, that if the Freehold Lands were sufficient, the Copyhold should not pass by the Deed, though there were no Creditor or Purchaser in the Case: And if so, then the Defendant hath both Law of his Side, and the better Equity. And he rely'd upon that substantial Difference, where there is a specific Lien, and where not; which distinguishes this Case from that of *Taylor and Wheeler*. For there the Copyhold Lands were specifically bound by the Mortgage, and the Creditors of the Bankrupt had no specific Lien at all upon them; they did

did not lend their Money upon the Credit of those Lands; but the Bankrupt being indebted to his Creditors, they were scrambling for what they could get. So the Creditors upon Judgment, had a general Lien only: They did not lend upon the Security of those very Lands, but were repaying themselves as well as they could; and therefore those Cases are good Equity; for the Equity that went along with the legal Interest, there being no specifical Lien, was not so good as the bare Equity only of the other Side.

Of Liens in Law, and in Equity.

'Tis generally true, that Law and Equity together shall prevail against Equity only; but then 'tis with this Distinction, that the Equity that goes along with the Law, is of the same Nature, and as strong as the other Equity. He took a Difference, where a Man originally lends Money upon a Security, and where a Man having Money due to him upon Bond, comes to the Debtor, and tells him he will trust him no longer upon Personal Security only, or, that if he won't give him real Security, he will immediately arrest him; and thereupon he assigns or mortgages Lands, which is the same Thing; and where a Man, who is already trusted with Money, seems to grow insolvent, whereupon his Creditors endeavouring to bolster up their Security as well as they can, find out Copyhold Lands, and get a Surrender of them. For, in the first he trusts his Money upon the real Security, in the latter he does not. So the Bill was dismissed, and the Decree of the Master of the Rolls affirmed.

In this Case, 'twas said by *Vernon*, that by the Rule of Law and Equity both, being too hard for Equity only, it must be intended where there's no Notice. Lord Chancellor. That is no Exception. For he that has Notice, has no Equity at all.

Anonymus.

THE Case was this. *A.* was seized of two Acres, one in Fee, the other in Tail; and having two Sons, he by his Will, devises the Fee Simple Acre to his eldest Son, who was Issue in Tail; and he devised the Tail Acre to the youngest Son and dy'd: The eldest Son entered upon the Tail Acre; whereupon the youngest Son brought his Bill in this Court against his Brother, that he might enjoy the Tail Acre devised to him, or else have an Equivalent out of the Fee Acre; because his Father plainly designed him something. Lord Chancellor. This Devise being designed as a Provision for the younger Son, the Devise of the Fee Acre to the eldest Son, must be understood to be with a tacit Condition, that he shall suffer the younger Son to enjoy quietly, or else, that the youngest Son shall have an Equivalent out of the Fee Acre, and decreed the same accordingly.

Comper
Chancellor.
Enailed.
Lands devi-
sed. Vide
ante Harris
versus Har-
well.

Lord

Lord Altham, versus the Earl of Anglesey.

On an Issue directed out of Chancery, to be try'd in B. R. The Case appeared to be thus:

What will make a good Tenant to the *Precipe*, for suffering a Recovery. See 2 Salk. 568. 1 Show. 347. Cumb. 425.

Depositions of Witnesses.

Construction of the Statute 29 Car. 2. c. 3. as to Declarations of Trusts, &c.

TENANT in Tail, Remainder in Tail, with Remainders over. Tenant in Tail, having a Mind to dock the Intail, and bar the Remainders, levies a Fine with Proclamation *sur Conusance de droit come ceo*, &c. to J. S. and his Heirs, in order to make him Tenant to the *Precipe*; but no Use of this Fine was declared. Seven Years afterwards, a *Precipe* was brought against J. S. who came in and vouched the *Conusor* of the Fine, who vouched over the common Vouchee, and the Question here was, if J. S. were a good Tenant to the *Precipe*, and the common Recovery well suffered.

Another Point was, if Depositions of Witnesses, taken by Virtue of a Commission, out of the Court of Chancery in England, for the Examination of Witnesses in Ireland, in a Cause between the same Parties, and their proving Copies of the said Fine and Recovery in Ireland, were good Evidence, and should be allowed to be read as such here, seeing the Witnesses only swore, that they were true Copies at the Time of their Examination. But this Objection was answered, in as much as it appeared, that those Copies were kept in the Hands of a certain Person, without any Alteration.

As to the first Question, it was resolved by Holt, Powel, Powis and Gold, that the said J. S. was a good Tenant to the *Precipe*, and that the Recovery was well suffered, and all the Remainders barr'd.

This Question doth arise principally upon the Statute of Frauds and Perjuries, 29 Car. 2. ca. 3. Whereby 'tis enacted, that all Declarations or Creations of Trusts, or Confidences of any Lands, Tenements, or Hereditaments, shall be manifested, and proved by some Writing signed by the Party, who is by Law enabled to declare such Trust, or else by his last Will in Writing, or else they shall be utterly void, provided always, that where any Conveyance shall be made of any Lands, or Tenements, by which a Trust or Confidence shall or may arise, or result by Implication or Construction of Law, or be transferred or extinguish'd, by an Act or Operation of Law, then, and in every such Case, such Trust or Confidence shall be of the like Force and Effect, as the same would have been, if this Statute had not been made.

It was unanimously agreed, that this Statute did not extend to this Case, viz. where there is only Cognizor and Cognizee, and that it extended only to third Persons; though it was objected, that in this Case, when, by the Fine, the legal Estate was convey'd to J. S. and his Heirs, and no Use declared of it, that the Use did result to *Conusor* and his Heirs, and then before the *Precipe* was brought, the legal Estate was out of the *Conusee*, by Virtue of the Statute, for transferring Uses into Possession. But Holt, C. J. and Powel held in this Case, that

when

when a Fine is levy'd, or a Feoffment made to a Man and his Heirs, the Estate is in the Conusee and Feoffee, not as an Use, but by the Common Law, and may be averred to be so; and for the Form of pleading the Averment, you may see *Co. Ent.* 219, 220. Where a Fine was lev'd, and the Conusee in pleading averred, *Cujus quidem Finis preteritū predictū, J. S. fuit seifitus de, &c. cum pertinent in Dominico suo ut de feodo*, and in *Plowd.* 477, 478. A Feoffment was pleaded *Habendum* to A. and his Heirs for ever, *Virtute cujus Feoffment idem A. fuit seifitus de, &c. cum pertinent in Dominico suo ut de feodo*; and in this Case it plainly appears, that the Intent of the Fine, was to make the said J. S. a Tenant to the *Precipe*, for the common Recovery, and when the common Recovery is effected, a Use shall arise by Operation of Law from the Conusor and his Heirs, * from whom the Estate first moved.

Holt C. J. held, that *Uses* were not within this Statute, but that the Statute did restrain only the Operation of Trusts and Confidences in Chancery; but all the other Justices held the contrary, and that *Uses* were within it; for the Common Law makes no Distinction between Trusts and Confidences, and *Uses*; and there was no Foundation to make a Difference between Trusts and *Uses*, since the Statute 27 H. 8. though they have done it in Chancery. And now, since the Statute of Frauds, 29 Car. 2. ca. 3. no Stranger can take a Use by any Parol Averment.

If a Fine be levy'd to a Man and his Heirs, to the Use of him and his Heirs, in this Case, he shall take by the Common Law, and not by way of Use; and in this Case, there may be a Parol Averment, to prevent a resulting Use to the Conusor in Fee; for when the Fine is levy'd, an Use doth immediately arise, either to the Conusor and his Heirs, or to the Conusee and his Heirs; and when there is a subsequent Deed, it only shews what the Intent of the Parties was, at the Time of the Fine levy'd, 9 *Co. Doremans Case*; so that when a Fine is levy'd, an Use doth arise by Implication of Law, to the Conusee and his Heirs, and consequently this Case is excepted out of the Statute. The Fine and Recovery here make but one Conveyance; and if the Use shoul result to the Conusor and his Heirs, it would destroy the middle Part of the Conveyance, and defeat the plain Intention of the Parties, which was to put the Use in the Conusee; and this is evident, because the Conusor, by suffering himself to be vouched, has own'd it. And how could Tenant in Tail make himself Tenant in Fee, if so be this must be construed a resulting Use.

As to an Objection that was made, that there might be a long Time between the Fine and Recovery; admitting that there had been a long Time between the Fine and Recovery, yet there it may be made good by a Parol Averment, before the Statute of Frauds, and by Writing

F since,

* See the Case of *Long and Buckridge*, Trin. 4 Georgii adjudged, that the Averment of *Cujus quidem Finis preteritū, &c.* is only *expressio eorum quæ tacite in sunt, & nihil operatur*, and that *prima facie*, the Fine shall pass the Estate to the Conusee; and to bring the Use back to the Conusor, the Conusor must shew, that the Intent was not to give it to the Conusee; for else the Conusee shall be deemed to take the Estate by the Common Law. And this Case of Lord *Anglesey* and *Altham*, was there held to be good Law.

since, upon the Reason of *Doroman's Case*, if nothing were done intermediate to the contrary. *Dyer 136.*

Gold said, that if a Fine Sur' *Conusans de droit come ceo*, &c. were levy'd, a Use did result to the Conusor; but if the Conusee did grant and render the Lands to the Conusor in Tail, the Conusee was seized of the Reversion to his own Use. *Moor 156, Dyer 311.* So if a Feoffment be made to *A.* and his Heirs, upon Condition to enfeoff *B.* and his Heirs, without limiting or declaring any Use. In this Case, when *A.* has enfeoffed *B.* and his Heirs, an Use shall arise to *B.* and his Heirs, and in all Cases of common Recoveries, a Tenant to the *Precipe* shall be presumed, and that as well in a new Recovery as in an old one.

Depositions
in Ire and
read here,
and what is
meant by the
best Evi-
dence, &c.

As to the second Point, it was likewise unanimously resolved, that these Depositions might be read as Evidence, and that the Copies proved upon the Commission, were good Evidences of the Records of the Fine and Recovery in *Ireland*. 'Tis true, Evidence *Viva voce* is always best, and though the Law indeed requires the best Proof that can be had, yet, when better can't be had, it is satisfy'd with that which can be had. Now in this Case, there is no Way to fetch the Person out of *Ireland*, who examined these Copies; no *Subpœna* runs thither; neither can any Person be obliged to go into *Ireland*, to fetch Copies from thence: So that the Rule that the best Witnesses Evidence must be had, must be understood where the Party is to swear a Thing of his own Knowledge; this is like the common Case, where the Depositions of a Person that is sick or dead, or beyond Sea, are admitted as Evidence. *Holt* said, that Witnesses *Viva voce*, and Depositions, might be made Use of to the same Point, and so have the best Evidence, without taking away the other Evidence, or hindering the reading of Depositions; and so is the common Course about foreign Affairs.

Shotbolt versus Biscow, &c.

Friday,
May 30,
1712, J. G.
in Court.
Bill of inter-
pleader to
redeem, not-
withstanding
a Judgment
had and Fine
levy'd.
What
Charges and
Incum-
brances on
Lands, shall
be barred by
Fine or not.
1 Chanc.
c. 49, 720.
See 2 Chanc.
c. 257.
1 Vern. 152,
132.
2 Vern. 56,
189, 662.

THE Case, as it appeared upon the Pleadings, was thus; *William Shotbolt*, on his Marriage with *Alice*, Daughter of one Mr. *Biscow*, gave a Bond of 600 *l.* to the said Mr. *Biscow*, with a Warrant of Attorney, to confess Judgment thereon; and this Judgment was defeasanced on Payment of 300 *l.* to *Alice*, in Case she survived her Husband: Afterwards, about the Year 1706, the Plaintiff agreed with *William Shotbolt*, for the Purchase of his whole Estate for 900 *l.* whereof 700 *l.* was to be paid down; and in Regard the said Estate was subject to an Annuity of 20 *l. per Annum*, during the Life of a certain Person, 'twas agreed, that the Plaintiff should retain the other 200 *l.* in his Hands, to indemnifie himself against the said Annuity; and that after the said Purchase compleated, he should convey back the Estate for a Term of Years, redeemable on his Payment of the said 200 *l.* and Interest, after the falling in of the said Annuity. Accordingly *William Shotbolt* and *Alice* his Wife, by Indenture of Lease and Release, and Fine, convey the Estate to the Plaintiff and his Heirs, and the Wife at the same Time delivered

delivered up the Bond to be cancelled soon after the executing of these Deeds and Fine; in regard, *William Shobolt* was indebted to his Brother *Battalion Shobolt*, in the Sum of 200 l. and upwards, 'twas agreed for securing that Sum, the Plaintiff should mortgage the said Estate to the said *Battalion*, redeemable on his Payment of the said 200 l. and Interest, and accordingly the Plaintiff executed a Lease of the Premises, wherein reciting the Annuity of 20 l. per Annum, and the Judgment to *Bislow*, and that for indemnifying against these two Sums, it was agreed upon his Purchase, he should retain 200 l. in his own Hands, and so by Direction of *William Shobolt*, the Plaintiff mortgages the Premises to *Battalion* for a Term, redeemable on Payment of the said 200 l. and Interest: *William* dies, and *Alice* survives him, and *Bislow*, the Conusee in the Judgment, being likewise dead, she takes out Administration to him, and now would extend the Judgment on the Plaintiff's Estate, *Battalion Shobolt*, the Mortgagee, pretending that he only had a Title to the 200 l. secured by the Mortgage, and the Plaintiff brought an Ejectment, and recovered at Law, the Annuitant being dead; and he now likewise brought this Bill, that on Payment of the 200 l. to such of the Defendants, as had a Right to receive the same, he might redeem, and be let into the Possession of the Estate. The Defendant *Alice*, by her Answer, insisted, that the 200 l. belonged to her, by Virtue of her Judgment, which was Prior to *Battalion*, the other Defendant's Mortgage, and that this 200 l. was all she would be able to get for the 300 l. which the Judgment was given to secure; the Defendant *Battalion* insisted, that the 200 l. belonged to him as a Creditor, by Virtue of the Mortgage, and that *Alice's* Title was extinguished by the Fine; and it was agreed on all Hands, that the Plaintiff ought to redeem on Payment of the 200 l. only, but whether *Alice* or *Battalion* had a Right to receive it, was the Question; and for that, this Bill was in Nature of an interpleading Bill; he pray'd they might settle the Right between themselves, that so, he might not pay his Money to a wrong Hand.

For the Defendant *Alice* 'twas insisted, that this 300 l. was all the Provision she had, that it was expressly taken Notice of in the Mortgage, and the retaining the 200 l. was a Security, as well against that, in Case she should survive, as against the Annuity; that she surviving her Husband, and having taken Administration to her Father the Conusee, and the Judgment being Prior to the Mortgage, she had now a legal Title to lay on her Judgment, and that a Court of Equity, ought not to take it from her.

But for the Defendant *Battalion*, 'twas insisted, that she joining in the Fine with her Husband, that had extinguished all her Right, by Virtue of the Judgment; that if she herself had been Conusee, there had been no Question of it; for though a Release by the Conusee of all his Right to the Land of the Conusor will not prevent, or be a Bar to his taking out Execution after, yet such Right may certainly be extinguished, that as such Fine would have barr'd the Conusee himself, so her joyning will in Equity, defeat the Interest of her Trustee; that upon the Fine, she was examined, and consented to part with all Right in
the

the Land and if she should be allowed by this Judgment, to take back again any Right to the *Land*, that would be to derogate from her own Grant; they agreed, indeed, that her joyning in the Lease and Release, would not extinguish her Interest in the Judgment; but the Fine wherein she joyn'd, carry'd away all her Right and Interest in the *Land*. That at the levying of the Fine, she had delivered up the Bond, and though that neither, would be sufficient to bar her without the Fine, yet 'twas an Argument that she relinquished her Security, and that the Reason of taking Notice of the Judgment in the Mortgage was, because that was still standing out as a legal Lien upon the Land, that her Father being then dead, and she having taken out Administration to him, 'twas proper for the Purchaser to secure himself as far as he could against it: That if it had been intended, the Security for the 300 *l.* should be continued; the Purchaser would have retained the 300 *l.* in his Hands for that Purpose; and that 200 *l.* only being retained, was an Argument they never intended the Purchaser should be charged with that, which was not an adequate Security for the 300 *l.*

And the Lord Keeper was clearly of that Opinion, and decreed the Plaintiff should be admitted to redeem, and should have his Costs; and that the Defendant *Battalion* had the Right to the 300 *l.* as an honest Creditor, and decreed accordingly, that the Plaintiff should have his Costs, and the Defendant *Alice* to procure Satisfaction, to be acknowledged on the Judgment, at the Defendant's Cost.

Cure versus Howard.

J. l. in Rot. verb. Rec. in Cha. 330.

Of contingent Re-
mainders,
and resulting
Uses. See
1 Chanc.
27, 296.
2 Chanc.
c. 26, 231.
1 Salk. 228.
1 Vern. 108,
276, 366,
467.
2 Vern. 28,
294, 436.
2 Vent. 312,
361.

THIS Cause came on to be heard by Consent, upon Bill and Answer, only for the Opinion of the Court; and upon reading several Deeds, it appeared to be thus. *Robert Howard* seized of an Estate of Inheritance by Indenture in 1677, covenants to levy a Fine thereof to one *Cure* and *Broadstreet*, and their Heirs, to the Use of himself for Life; and after, to such Uses, Intents and Purposes, as he should by any Deed or Writing under his Hand and Seal, executed in the Presence of *Q.* or more credible Witnesses, during his natural Life, direct and appoint, and for want of such Direction and Appointment, in Trust for him and his Heirs; and a Fine was levy'd accordingly; and the said *Robert Howard*, afterwards intermarrying with one *Winifred*, by whom he had Issue *Robert*, and the said *Robert* his Father being seized in Right of his said Wife of other Lands of Inheritance, they, by Indenture of Lease and Release, and Fine duly levy'd thereon, grant and convey these Lands to Trustees and their Heirs, to the Use of *Robert* the Father for Life, and after, to *Winifred* for Life, Remainder to the Wife of *Robert* the Son, and the Heirs Male of his Body issuing, Remainder to the right Heirs of the Survivor of them, the said *Robert* the Father and *Winifred* the Wife, for ever; afterwards, upon the Marriage of *Robert* his Son with *Mary Anne* his Wife, one of the Defendants, by Indenture of Lease and Release, 9th and 10th July, 1698, be-

tween *Robert Howard* the Father, and *Winifred* his Wife, and *Robert Thirson* of the first Part, *Anne Broadstreet*, Daughter and Heir of *Broadstreet*, the surviving Trustee in the Deed of 1677, of the second Part, *Mary-Anne Woolf* of the third Part, and others of the fourth and fifth Parts, in Consideration of a Marriage between *Robert* the Son, and *Mary-Anne Woolf*, and of 4000*l.* Portion, and other Considerations, *Robert* the Father, and *Winifred* the Wife, and *Robert* the Son grant, release, and convey several Lands, Tenements, and Hereditaments, therein particularly mentioned, being as well those whereof *Robert* the Father was at first seized, in Right of the said *Winifred* his Wife, as others whereof he was sole seized in Fee, to Trustees and their Heirs, to the Uses following, viz. as to Part, to the Use of *Robert* the Father, for 99 Years, if he should so long live; Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders; Remainder to the Use of *Winifred* for Life; Remainder to *Robert* the Son for 99 Years, if he should so long live; Remainder to Trustees during his Life, to support contingent Remainders; and as to the other Part to the Use of *Robert* the Father, and *Winifred* his Wife, for their Lives, and the Life of the longer liver of them; Remainder to *Robert* the Son for 99 Years, if he should so long live; Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders; Remainder as to the other Part, to *Robert* the Son, in Possession for 99 Years, if he should so long live; Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders; Remainder to *Mary-Anne* for Life, for her Jointure; Remainder of the whole, as the several Estates before limited, should respectively determine to the first Son of the Body of *Mary-Anne*, to be begotten, and of the Heirs Male of the Body of such first Son lawfully issuing, and so to the second and other Sons in like Manner; Remainder to the Heirs Male of *Robert* the Son; Remainder to the right Heirs of *Robert* the Father for ever; and *Robert* the Father covenants, that he and *Winifred* his Wife, would levy a Fine of all the said Lands, to the Uses before mentioned, and by the same Indentures, *Anne Broadstreet*, by the Direction of *Robert* the Father, grants, releases, and conveys, and he ratifies and confirms all the Lands, by the Deed of 1677, limited to her and *Broadstreet*, and their Heirs, to the Use of *Robert* the Father, for 99 Years, if he should so long live; Remainder to Trustees during his Life, to support contingent Remainders with other Remainders, over to the right Heirs of the Father for ever. A Fine was accordingly levy'd, and the Marriage took Effect, and they had Issue *William* a Son, and *Winifred* a Daughter; then *Winifred* the Mother dies, and then *Robert* the Son dies, then *Robert* the Father 15 January, 1706, makes his Will, and thereby devises all his Lands, Manors, Tenements and Hereditaments in Possession, Reversion, Remainder or Expectancy whatsoever, to *Charles Baggot*, *Richard Baggot* and others, and their Heirs in Trust, by the Sale or Mortgage, to raise so much as would be sufficient to pay his Debt, and the Legacies thereby given, and gives several Legacies to the amount of 3000*l.* and upwards, and makes *Mary* his then Wife, Executrix, and dies considerably indebted,

Where a
Remainder
by Purchase,
bars a
Devise, &c.

and some Time after his Death, *William* the Grandson dies without Issue, and now the Bill was brought by the Creditors and Legatees of *Robert* the said Father, against *Mary* his Executrix, and *Mary-Anne Howard* and *Winifred* her Daughter, *Charles* and *Richard Baggot*, and others, to have a Satisfaction of their Debts and Legacies, pursuant to the Will of old *Robert*: The Defendant *Mary-Anne Howard* sets out the Indentures of 9 and 10 July, 1698, and insists in Behalf of *Winifred* her Daughter, that the Remainder of all that was thereby limited to *Robert* the Father, for 99 Years, with Remainder to his right Heirs, vested in *Winifred* her Daughter, as Heir to *William* her Brother, as a contingent Remainder by Purchase, and so not subject to *Robert* the Father's Disposal by Will, and whether they were, and how many, and which of them was so subject, was the only Question; and first, as to the Lands limited to *Robert* the Father for Life, with the last Remainder thereof to his own right Heirs, there was little or no Question made of it; but that it was the old Reversion in Fee in him, and consequently liable to be disposed of as he thought fit; but as to the other Lands limited to him for 99 Years, with such Remainder to his own right Heirs, there were very solemn Arguments, how far he had a Power over it, and that was divided into three Points.

First, Whether if these Lands comprized in the Deeds of 1677, and whereof he was seized in Possession at the Time of the Marriage Settlement upon his Son, the Remainder to his right Heirs should be looked upon to be the old Reversion, and so under his Power of devising.

Secondly, Whether if the Lands comprized in the Deed of 1677, the Remainder to his own right Heirs should be looked upon to be void, and the old Reversion vested in himself, and so pass by his Will.

Thirdly, Whether the Remainder to the right Heirs of the Survivor of the said *Robert* the Father, and *Winifred* his Wife, was capable of being settled to the Uses therein limited, and if so, whether the Remainder to the right Heirs of *Robert* the Father was so vested in him, as to be subject to his Will.

First Point.
See 2 Vern.
43, 195,
359, 668.

As to the first Point, 'twas argued, that this Remainder to the right Heirs of *Robert* the Father, was a contingent Remainder, and vested in his right Heir by Purchase, and was no Part of the old Use resulting to himself, and consequently not liable to his Disposition by Will, and so this Case differed entirely from the Cases of *Fenwick* and *Mittford*, and *Pibus*, and *Mittford*; for in these Cases, there was no Disposition at all made of the old Use, during his Life, so consequently his right Heirs could not be Purchasers; and the Reason they construed the old Use to continue in him during his Life was, because it might happen, that all the Estates might be determined during his Life, and then there would be no Person to take the Freehold whilst he lived, because he could have no Heirs 'till after his Death; and it might happen, that all the Estates might determine in his Life-Time; and as he had made no Disposition of the Use during his Life, so the Use during his Life continued in him, and that upon Determination of the intermediate Estates being united, and conjoined with the Remainder to his right Heirs, made it

one consolidated Fee in himself, and consequently his Heirs must take by Descent, and not by Purchase; but where the entire Use was expressly limited out of him during his Life, so that by no Possibility, the intermediate Estates can determine during his Life; there the Remainder to his right Heir is a good Remainder, and they shall take by Purchase and not by Descent; and he said, that Difference was taken and agreed to in the Case of *Tippen and Colen*, in 4th Mod. 300, in which Case, the Cases of *Fenwick and Mittford*, and *Pibus and Mittford* were all cited, and here in the principal Case, he has limited the Use during his Life, to Trustees, to support contingent Remainders, and so has disposed of the old Use during his Life, and consequently there can be no old Use Remaining in him, to unite with the Remainders, limited to his right Heirs; and then they shall take the Remainder as Heirs by Purchase: And *Letchmere* said, he having limited such an Estate to Trustees, during his Life, to support contingent Remainders, the Law shall never, against his own express Limitations, bring back the Use to him again, during his Life; for then it must take it out of the Trustees, to whom he has by express Limitation given it, during his Life, he has no Estate of Freehold to unite and consolidate with the Remainder to his own right Heirs, and consequently they can't take by Descent from him, but must take as Purchasers, and then he had no Power to subject this Remainder to Debts or Legacies by his Will,

As to the second Point, whether the Remainder to his own right Heirs of the Lands, comprised in the Deed of 1667, was a void Remainder, and vested in himself as Part of the old Use; this, they said, was a much stronger Point; for besides, that the Limitation to himself is only for 99 Years, as the former Limitations were; the legal Estate of this Part of the Lands, was standing out in the Trustee, and then there can be no Pretence of any resulting Use to him for his Life, for nothing moved from him, but the whole Estate was in the Trustee, and passed from him to the several Uses, and so he being a Stranger, might by Will, limit the Remainder to the right Heirs of old *Robert*, so as to make 'em capable of taking by Purchase, since there could be no Use remaining to him, after the Settlement, when it had none before; and it was urged strongly, that for another Reason, the right Heirs might be Purchasers of this Part of the Estate, for by the Deed of 1677, the Use was limited to him but for Life only, and after his Death, to such Uses, Intents and Purposes, as he shall direct and appoint, and for want of such Direction and Appointment, to his own right Heirs; so that he had Time, during his whole Life, to make such Appointment, and consequently the Estate in the mean Time must be lodged in the Trustees, to supply such Appointment when it comes, and then he only having an Estate for Life in these Lands, could not make good any of the Limitations in the Settlement of 1698, beyond his own Life; for suppose he should afterwards have made an Appointment pursuant to his Power, this must have taken Place of the Settlement, and defeated all these Uses as to this Part of the Land; because he had Power during his whole Life to make that Appointment, and consequently during his Life, the Estate must continue in the Trustees, to answer and supply that Power; and so is Co. 10, 85. expressly
in

in Point. But they urged farther, that this very Settlement of 1698, was an absolute Appointment in Pursuance of his Power ; for the Heir of the surviving Trustee was a Party to it, and joins in the conveying of those very Lands, and 'tis said to be by Direction and Appointment of *Robert Howard* the Father, who had such Power of appointing, so it can't be taken to be other then an Appointment in Pursuance of his Power, and then the Estate lodging in the Trustees to supply and answer such Appointment, when he limits the last Remainder to his own right Heirs, they must take by Virtue of the Appointment, and consequently must take as Purchasers, because the Estate was lodged in the Trustees, to answer such Appointment ; and the Father had only the bare Power of appointing the Uses, and so can never derive an Estate by Descent to his Heirs, when he had no Fee nor legal Estate in himself, but a bare Power of appointing the Uses, which must after draw out the Possession from the Trustees according to these Uses.

Third Point.

As to the third Point, 'twas argued, that the Remainder of *Winifred's* Inheritance, limited to the right Heirs of the Survivor of her, and *Robert* her Husband, was a contingent Remainder ; and *Robert* the Father being the Survivor, the same vested in his right Heirs by Purchase, and consequently not subject to his Disposition by Will, and they insisted that the Fine levy'd by *Robert* the Father, and *Winifred* the Wife in 1698, had not barr'd or destroyed that contingent Remainder, because of the intermediate Estate Tail to *Robert* the Son, which was sufficient to preserve it ; and then the Fine enur'd only as a Grant of what they might lawfully grant, and did not any Ways touch or affect this Remainder.

F. contra.
First Point.

On the other Side 'twas argued, by *Prat* and others, as to the first Point, that this was within the Reason of the Cases of *Fenwick* and *Mittford*, and *Pybus* and *Mittford*, and that here was a resulting Use to him during his Life, because it might happen, that all the intermediate Estates might determine before his Death ; for suppose the Trustees during his Life, to support the contingent Estate, should forfeit their Estates and all Estates determine, what then would become of the Freehold during his Life ? For his Heirs could not have it, and so he himself must have it as Part of the old Use undisposed of ; which being conjoyn'd with the last Limitation to his right Heirs, will make an entire Fee in himself, and consequently his right Heirs can't be Purchasers, any more than if he had no Limitation at all of the Fee in him.

Second Point.

As to the second Point, 'twas argued,

First, That the last Limitation in the Deed of 1677, being to the Trustees, and their Heirs, in Trust for *Robert* and his Heirs, was executed to him in Possession as absolutely, as if it had been said to the Use of him and his Heirs ; for the Statute makes no Difference between an Use and a Trust, but mentions them promiscuously ; and this, upon reading the Deeds, seemed to be given up as a clear Point.

Secondly, Admitting it should not be so, but that the legal Estate continued in the Trustees, yet, in a Court of Equity, it must be look'd upon, as if he himself had been in actual Possession, and made such Settlement ; for that a Trust in this Court was considered by the same Rules,

and

and capable of the same Limitation, as the Possession was at Law, and no Manner of Difference betwixt them.

Thirdly, That 'till an Appointment made, 'twas the Use of him and his Heirs, and an Appointment was always wanting 'till it was made, and that he had good Power to dispose and settle the Remainder of these Lands to the Uses in the Marriage Settlement, because there was no Appointment thereof before, and consequently nothing to hinder him from disposing thereof as he thought proper.

But *fourthly*, admitting the Settlement in 1698, should be construed to be an Appointment, pursuant to his Power, yet 'twas only a partial one, and made no Disposition of the Use during his Life; for if the Trustees to support contingent Remainders, should forfeit their Estate, or have joined with these in Remainder, in conveying their Estate, and then all the intermediate Estates had determined; yet here would remain an undisposed Use during his Life; for of that he had made no Appointment, and then that being united with the last Limitation to his own right Heirs, make an entire Fee in himself, and consequently his Heirs must have taken it by Descent, and not by Purchase; and then he had good Power over it, and the Disposition of his Will must stand.

As to the third Point, 'twas urged, that this Fine by the Husband and Wife in 1698, destroyed or gave away the Remainder to the right Heirs of the Survivor of them, because they both joined in it; and in *Albany's Case* it is said, that a common Fine destroys all Rights, all Titles, all Possibilities, both present and future, and if so, the Fine in this Case, which is of so much a higher Nature, must do it *a fortiori*.

Third Point.

Secondly, This Fine estops the Heir to claim the Estate against the Fines of his Ancestor; he can't say that *partes finis nihil habuerunt*, but is thereby totally barr'd and estopped from claiming it.

Thirdly, that this was no contingent Remainder, or if it was, yet *Robert* the Husband surviving, the Contingency was then at an End, and then his Heirs must take it; but then, he having an Estate in Fee therein, they could not take it but only by Descent, for then the whole Fee was vested in him, and consequently he had good Power to subject it by his Will to the Payment of his Debts and Legacies.

Lord Keeper after all, ordered a Case to be stated on these several Points, out of the Deeds, and then he would consider of them and give his Opinion, and if it were necessary, would desire the Assistance of some of the Judges in it; but inclined pretty strongly, that old *Robert* had Power to subject all these Lands by Will as his old Reversion undisposed of, and said, they might argue to the contrary from Sun Rising to Sun Setting, but he thought they would not alter his Opinion.

Curia.

King *versus* Withers.*S. C. in tot. verb. Acc. in Ch. 34 P.*

Where a De-
vise, on Con-
dition not to
marry with-
out Consent,
&c. shall be
an absolute
Devise. See
1 Chanc.
c. 22, 58, 138.
2 Chan. r. 23,
95.
1 Vern. 20.
2 Vern. 293,
357, 452.
572, 720.

THIS Cause came on to be heard by Consent, and was thus: The Defendant's Father by his Will in Writing duly attested, devised to the Defendant, who was his Heir at Law, and to his Heirs, all his Lands, Tenements and Hereditaments, in the County of *B.* except such and such Part thereof, charged and chargeable with the Sum of 2500 *l.* to his Daughter (since married to the Plaintiff) at her Age of 21, or Marriage, which shall first happen, and devised the excepted Lands in Trust, to be sold for the Payment of his Debts, provided that if his said Daughter should marry in the Life of her Mother, without her Consent first had in Writing, 500 *l.* of the said 2500 *l.* should cease, and should be applyed towards Payment of his Debts, charged upon the said excepted Lands, and appoints his Wife to be Guardian of his said Daughter, and makes her Executrix and dies; the Daughter attains the Age of 21, and afterwards, without the Consent or Privity of the Mother, intermarries with the Plaintiff, who is a Gentleman of some Estate, and called to the Bar, but had made no Settlement or Provision for his Wife; and so the Defendant, the Heir at Law, refused to raise or pay any Part of his Sisters Portion, and insisted likewise, that by her Marriage without her Mother's Consent, 500 *l.* Part of her Fortune, was become forfeited, whereupon the Plaintiff brought the Bill, to have the whole Portion raised and paid by a Sale of the Lands charged therewith.

For the Plaintiff, 'twas insisted, that upon the Daughter's attaining the Age of 21, the whole Portion became vested in her, and that she might then have demanded it; and though she afterwards marry'd without her Mother's Consent, yet that could not divert or bring back the Portion which was before vested and settled as an Interest in her; for that Consent in all Reason, could be carried no farther, than during her Minority, or until she attain the Age of 21; during which Time, she was appointed to be under the Care and Tuition of her Mother; and so long it might be reasonable to restrain her Marriage, without her Mother's Consent, but not after: And though the Words are, if she marrys without her Mother's Consent during her Life; yet that must be taken only, if her Mother be living, during the Time such Consent was necessary; that is, during her Minority, for which time she was to be under the Mother's Guardianship, but upon her attaining her Age of 21, the Power of her Mother as Guardian ceased, and consequently it was never intended to confine her beyond that Time, to her Mother's Consent in Marriage: That here was no Devise of the 500 *l.* over, and so it must be only taken to be *in Terrorem*, according to the Resolution in *Fry* and *Porter's* Case, and consequently the Plaintiff ought to have the whole Portion raised by Sale of the Lands charged therewith, unless the Defendant would otherwise provide for the Payment thereof.

On

On the other Side, 'twas insisted for the Defendant, that *Cujus est dare ejus est disponere*, that a Man may impose what Terms and Conditions he thinks fit, in the Disposal of his Estate, that here he has expressly made the Mother's Consent requisite, during her Life; and to say the whole Portion vested in the Daughter upon her attaining the Age of 21, is nothing to the Purpose; for though it did, yet without Question, the Condition may bring it back again; as if a Feoffment in Fee be made upon Condition, here the Estate is vested, yet the Breach of the Condition will fetch it back again out of the Feoffee; and when the Devisor has in express Words, restrained her from marrying without her Mother's Consent, during her Life, you won't reject surely this Condition, and give her the whole Portion, without any Regard to her observing the Terms of it; besides, here is a Devise over; for upon her Marriage without her Mother's Consent, the 500 l. is to go towards Payment of the Debts, in Ease of the other Part of the *Testator's* Estate, made liable thereto; and though there were no such Devise over, yet the 500 l. is forfeited by her Violation of the Condition annexed to it, and so it was held in the Case of *Bennet* and Lord *Sallisbury*.

Lord Keeper. This Portion did not vest in the Daughter presently, *Curia.* for 'tis not given to her generally to be paid, or payable at such a Time; but 'tis given to her at the Age of 21, or Marriage, so that before that Time, no Interest or Right to it is vested in her, but here she attained the Age of 21, and I take it clearly, this is not a particular or present Legacy, but is to be raised out of the Lands, and so must have the same Construction as a Devise of the Lands themselves would, and I think the Distinction, that where there is no Devise over, that the Condition shall be taken to be only *in Terrorem*, is a great deal too wide; for here in Effect is no Devise over; for though it be to go towards Payment of Debts, yet here appear no Creditors to be concerned, none that are in Danger of losing their Debts, and so I shall consider it as it stands upon the Condition itself; and I think in this Case, the Plaintiff must have her whole Portion, for the *Testator* has appointed two Times, Marriage or 21, to entitle her to it, and which soever of them first happened, gave her a Right to it; and here she has attained her Age of 21, and that singly, gives her a Right to it: Indeed, if she had married before that Age, she must have had her Mother's Consent, otherwise, she was to lose 500 l. but when she attains her Age, and marries after, her Title to the whole is accrued, which was compleat by her attaining that Age; it is not to be impeached after by her Marriage, without her Mother's Consent; for as her Marriage by her Mother's Consent, was one Title, so her attaining the Age of 21, was another Title: And which ever of them first happens, entitles her to her own Portion, and she having attained the Age of 21 first, her Title to the Portion now vests wholly upon that; and so there must be a Decree for Sale of so much of the Lands, as will be necessary for that Purpose, unless the Defendant will otherwise secure the Payment of it; but the Money when raised, must be brought before the Master, 'till the Plaintiff makes a Settlement on his Wife for such Purpose;
he

he is likewise to bring his Title Deeds before the Master, to see what Provision he can make for her.

Kittson versus Kittson & al.

Eodem die.
The Custom
of London, as
to Free-
mens Estates,
where the
Wife shall
be barr'd of
her custom-
ary Part or
not. See
1 Vern. 132.
2 Vern. 110.
& Abr.
Eq. 157.
and post
Loeffies.

MR. Francis Kittson, Coach-Maker, being a Citizen and Freeman of London, and seized of a good real Estate, and also possessed of and entitled to a considerable Personal Estate, makes his Will the 20th of September, 1711, and thereby devises to his Wife *Ann Kittson* the Plaintiff for Life, all his Lands, Tenements and Hereditaments whatsoever, at *Inguille Green* in the Parish of *Eglin*, and County of *Surry*; and after her Death, he devises the same to his Nephew *Edward Kittson* of *Henley*, and his Heirs for ever; and after several Legacies and Bequests, he goes on, *Item* as to the House wherein I now dwell, together with all my Stock of Timber and other Stock, Goods, Chattels, Debts, and Personal Estate whatsoever, and wheresoever, I give and devise unto my said Wife *Ann Kittson* for her Life, with Power to her to dispose of 500 *l.* Part thereof at her Death; and after her Death, I give and devise all my said Stock, Goods, Chattels, and Personal Estate, except the said 500 *l.* to and amongst my Sisters *Elizabeth Kittson*, *Elizabeth Thorpe*, and several others of the Defendants; he likewise gives to his Wife for Life, all his five Houses in *Hedge-Lane*, and after her Death, he gives the same to his said Nephew *Edward Kittson* his Executor and Administrator, and makes his said Wife and Mr. *Robins* Executors, and dies; Mr. *Robins* alone proves the Will, and the Widow brought this Bill against him, and also against the said *Edward Kittson*, and *Elizabeth*, and the rest of the Residuary Legatees, and also against one *Edward Kittson*, who was Heir at Law to the Testator, to establish the Will, and to have the Lands and Estate at *Inguille Green*, quieted to her for Life, and likewise the five Houses in *Hedge-Lane*; and also to have one Moiety of the Personal Estate, and her Widow's Chamber as her own for ever, by Virtue of the Custom of *London*, as a Freeman's Widow, there being no Children; and to have the other Moiety of the Personal Estate for Life, by Virtue of the Will, and disposing 500 *l.* thereout at her Death. The Defendant *Robins* answered, and submitted to do as the Court should direct the other Defendants; likewise answered and insisted, that the Plaintiff ought to make her Election, to take either by the Custom of *London*, or by the Will, and not by both, and brought a Cross Bill to that Purpose, and to have an Account; and as to *Edward Kittson*, the Bill was, that in Case the Widow should elect to take by the Custom of *London*, that he might be let into the immediate Possession of the Estate at *Inguille Green*, and the five Houses in *Hedge-Lane*, and as to the rest, that in Case of such Election, they might have a Moiety of the Personal Estate forthwith.

For the Widow 'twas insisted, that as to the Estate of Inheritance at *Inguille Green*, she had brought the Heir at Law before the Court, to establish the Will against him, and also against the Devisee in Remainder, and that there could be no Colour to take away the Estate for Life,

that

that Part of the Estate being expressly and specifically devised to her for her Life, and the Devise thereof collateral and independent of the Devise of the Personal Estate; and as to the Personal, 'twas insisted, that the Testator must be supposed to know, that he was a Freeman, and that as such he had not Power at all over a Moyety thereof, but that by his Death, the same vested in his Widow as her own for ever, and consequently when he devised all his Personal Estate, that could be intended no more, than he had a Power over, which was his own Moyety; as to the other Moyety, 'twas none of his to dispose of, nor could he by his Will, make better or worse his Wife's Title thereto, so his Devise of all his Personal Estate, must be meant, all he had a Power over, all he could give, not what this Custom of *London* had already given her, and consequently she must take her own Moyety by the Custom, and the other by his Will.

On the other Side, 'twas argued, that the Plaintiff was very unreasonable in her Demand, that in this Court, wherever a Person had a Debt owing to him, and the Debtor by his Will gave any Thing which was Equivalent to or more than the Debt, it had always been allowed to go in Discharge and Satisfaction of the Debt, much more in this Case of a Customary Part, which was in the Nature of a Debt or Demand out of the Testator's Personal Estate, and so when he gives her all his Personal Estate for Life, it must be supposed, he intended it in Satisfaction of her Moyety thereof, due by the Custom of *London*; that 'tis plain in this Case, he intended her the Power of disposing of 500 *l.* only of his Personal Estate, and no more, for he not only gives her no more to dispose of at her Death, but when he comes to dispose of the Residue, he takes it up, and says all the rest of my Personal Estate, except the 500 *l.* I give and devise to the Defendants; so that 'tis plain, he intended she should have Power to diminish or lessen his Personal Estate no more than the 500 *l.* only; and though this Devise could not debar or exclude her of her Customary Part, if she thinks fit to elect it, yet she ought not to take both; and of this, there can be no Doubt, since the Case of *Heron and Heron*, where Sir *John Heron* had canton'd out his Real and Personal Estate among his Children and Wife, and after his Death, my Lady *Heron* would have had not only what was so given her by her Husband, but also the customary Part of a Freeman's Widow; but was decreed by Lord *Cowper*, to make her Election, and that she ought not to claim both, and the Case of *Lawrence and Lawrence*, was cited to the same Effect. And

Lord Keeper was clearly of this Opinion, and pronounced the Decree accordingly; but held, as to the Estate at *Inguille Green*, it had no Dependence upon, or Relation to the Devise of the Personal Estate; but that though she made her Election, (as she did in Court to take by the Custom) yet that the Devise of that Estate continued good to her for Life; though 'twas urged, and Mr. *Vernon* and *How*, said privately between themselves, that upon her electing to take by the Custom, she ought to have no Benefit at all of the Will, but that *Edward Kittson* the Devisee in Remainder, ought to be let into Possession of that Estate immediately; but his Lordship held otherwise, and as to the five Houses

See 2 Vern.
365.
But Note,
That the
Decree in
that Case was
afterwards
revers'd in
the House of
Lords, &c.

Houses in *Hedge-Lane*, they being Leasehold, were decreed to come in with the rest of the Personal Estate to be sold, and the Money divided accordingly.

But as to them, the Court seemed not to have apprehended the Case rightly; for they being expressly given to the Widow for Life, and after her Death, to *Edward Kittson*, together with the Estate at *Inguille Green*; they ought, as it seems, have gone accordingly, for by the Decree for the Sale of 'em, the Remainder to *Edward Kittson* is destroyed, which surely the Court never intended, whatsoever they thought fit to do as to the Widow's Estate for Life therein; for if the Estate for Life to the Widow of the Lands of Inheritance were good, it seems, so must the Devise of all these Houses, being expressly devised to her, before he came to the Devise of the Residuum, otherwise, there is an Injury done to *Edward Kittson's* Remainder therein, but this was not taken Notice of, or explained by the Court.

There was another Point in the Case, which was this; *Francis Kittson* about three Years ago, purchased the Remainder of a Mortgage Term of 1000 Years, in an Estate at *Egham*, of one *Booth*, which *Booth* had a Decree of Foreclosure, against one *Jane Reading*, the Heir at Law of the Mortgagor; that upon Payment of 20 l. to be put out by the Senior Master of the Court of Chancery, the said *Jane Reading* should within six Months after she came of Age, release and convey the Inheritance, and Equity of Redemption to *Booth*, his Heirs and Assigns, unless Cause shewn within six Months after she came of Age. That Term was assigned to the Defendant *Robins*, in Trust for Mr. *Kittson*, to attend the Inheritance when it should be conveyed; but the 20 l. was never paid, and no Conveyance yet made of the Inheritance, and whether this should be look'd upon as Real or Personal Estate, was submitted to the Court, and held, that by Reason of the Decree and Covenant for *Booth* for that Purpose, it must be deemed to be an Estate of Inheritance, and the Widow must have it for Life, and she to pay one third Part of the 20 l. and *Edward Kittson* the Devisee in Remainder the other two Thirds, with Interest proportionably, from the Time it ought to have been paid, *Booth* being become Insolvent.

Marhant versus Twisden.

A Devise of a Residuum, where it shall relate to the Personal Estate only, and be void as to the real Estate, by Reason of the Incertainty. See Skinner 130. 2 Vent. 285.

ONE *Sympson*, having settled all his Estate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby devises several pecuniary Legacies to several Persons, and then says, all the rest and Residue of my Estate and Chattels, Real and Personal, I give and Devise to my Wife, whom I make to be Executrix, and the only Question was, whether by this Devise, the Reversion of the Jointure Lands, passed to the Wife.

And the Lord Keeper having taken Time to consider of it, now delivered his Opinion, that it did not; because the precedent and subsequent

1 Lev. 212. 3 Mod. 228. 2 Vern. 351, 461, 621, 623. 1 Vern. 3.

quent Words, explain his Intent to carry only his Personal Estate; for in the first Part of his Will, having given only Legacies, and not Lands, whatsoever the Words, *all the rest and Residue of his Estate* are relative, and must be intended Estate of the same Nature with that he had before devised, which was only Personal; for having before given no Real Estate, there could be no rest or Residue of that, out of which he had given away none: Then the Words *Chattels, Real and Personal*, explain what Sort of Estate he meant; and makes the Devise, as if he had said *all the rest of my Estate, whether Chattels Real or Personal*, and so confine and restrain the extended Sense of the Word Estate; and he said, this Case differed from the Case of *Murray and Wice*, and that no Resolution was ever carried so far, as to construe these Words to pass a Fee.

Greenhill *versus* Waldoe.

IN this Case, upon a Marriage Settlement, after the common Limitation to the first and other Sons, a Term was limited to Trustees for 300 Years in Trust, upon failure of Issue Male, to raise with all convenient Speed, out of the Rents and Profits, or by Mortgage or Sale, 3000 *l.* for Daughters Portions, if more than one, to be equally divided between them; and if one Daughter only, she to have the whole 3000 *l.* and to be paid to such Daughter or Daughters, at their respective Ages of 18 or Marriage, which should first happen, after the Death of the Father and Mother; they have Issue two Daughters only, and no Son, and the Father by his Will, taking Notice of the Provision to his Daughters, devises to them 500 *l.* apiece more, to be paid at the same Time as their original Portions were payable; but in Case either of them died before the Age of 18, then the additional Portion of 500 *l.* apiece was to cease: The Father and Mother both died, the Daughters being about 15 or 16; the Plaintiff intermarries with one of them, and she being now about 20, this Bill was brought against the Defendant and Devisee of the Estate, charged with these Portions, and against the Trustees of the Term, to have the Portion raised, and Interest from the Death of the Father.

And 'twas insisted, that this was but reasonable, in regard the Father and Mother dying before the Portions became payable, there was no Maintenance provided for them in the mean Time, and it might have happened, that the Daughters were but two or three Years of Age at the Death of the Father and Mother, and if this Court in such Case, would not help them to a Maintenance, 'till their Portions became payable, they must starve; yet they were Heirs at Law, and disinherited; and so, if by any Construction they can be help'd, this Court would do it: That here the Portions are directed to be raised with all convenient Speed, and if they had been raised presently after the Father and Mother's Death, the Brother and Devisee of the Estate, could not complain, for his Estate was liable to the raising them presently; then when the Portions are raised, who is to have the Interest of them, in the mean time, 'till they became payable, not the Trustees; for they have nothing

Daughters
Portions
payable at 18,
and no Main-
tenance in
the mean
time; a
Maintenance
decreed. See
hereafter
Beale's Case,
and 2 Vern.
236, and Q.
Lord
Coventry's
Case.

thing to do with it in their own Right, not the Brother and Devisee; for he has the Estate, and no Wrong is done to him; so surely in such Case, the Daughters themselves would be entitled to it; so in this Case, though they are above 18, yet they ought to have Interest from the Time their Portions became raisable.

On the other Side, 'twas insisted, that there was no Direction for Interest or Maintenance, 'till their Portions became payable; that this was the Agreement of the Parties, at the Time of the Settlement, and could not be broke into; that if there had been no Portions at all provided for them, they might have Reason to complain, but could not be relieved; that in this Case, their Portions did not vest 'till 18 or Marriage, there being a Clause, that if either died before the Time, the whole Portion was to sink, that it being contingent whether both or either of the Portions would become payable, neither could vest 'till the Contingency happened as to both, that those additional Portions of 500 l. apiece by his Will, were in lieu of Maintenance, and that the Estate ought not to be charged farther.

But the Chancellor was of Opinion, they ought to have either Interest or Maintenance from their Father's Death, (he being the Survivor) and thought it much the same, whether 'twas called Interest or Maintenance; that the Father never intended they should starve, 'till their Portions became payable, and so sent it to a Master, to see what was reasonable for their Maintenance from the Time of their Father's Death, and decreed the original Portion to be raised by Sale, to be with Interest at 5 per Cent. being charged on Land, though 'twas pressed to be 6 per Cent. and Mr. *Vernon* cited the Case of *Waring* and *Waring*, where Maintenance in a like Case was decreed, 'till the Portions became payable, there being no Provision for it in the Settlement, and divers other Cases to the same Purpose. *Vide ante*.

Loeffes versus Lowen & al'.

A Freeman of London dies, leaving a Widow and two Daughters; one of the Daughters dies, the other shall have the whole of the Orphanage Parr. See 2 Vern. 110, 234, 340, 559, 754. 1 Vern. 88, 354. 1 Chanc. c. 181. 1 Lev. 32, 162, U. 1 Vent. 178.

IN this Case, the Question was, whether the Plaintiffs who were Creditors of one *Eyton*, should have the Benefit of a Bond for Payment of 1500 l. entered into by one *Bayly* to *Eyton*, or if the said Bond should be looked upon to be voluntary and fraudulent, as against the Creditors of *Bayly* who were Defendants, and they to be accordingly first satisfied out of *Bayly*'s Assets, they being Creditors only by simple Contract; and as to that, the Case appeared to be thus: One *Mason* a Vintner, and Freeman of London, made his Will about 24 Years since, and thereby devised one third Part of his Personal Estate to *Letitia* his Wife, and the other two Thirds to his Children and died, having only two Daughters *Letitia* and another, who afterwards died intestate, and unmarried; *Letitia* the Widow intermarry'd with *Bayly*, who was a Vintner likewise, and the Widow before Marriage, and she and her Husband after Marriage, continued to employ the whole Stock left by *Mason*, in

1 Mod. 79. *Kissfon's Case ante*.

in carrying on their Trade without making any Distribution or Division to the Children; some Time after, upon a Treaty of Marriage, to be had between *Letitia* the Daughter, and *Eyton* (the other Daughter being then dead) a Computation was made of what Fortune would come to *Letitia* the Daughter, and the same appearing to be short of what *Eyton* expected, *Bayly* agreed to make up her Fortune 4000 *l.* but there was no Writing or Memorandum of it under Hand; but *Bayly* did afterwards pay all but 1500 *l.* of the Fortune agreed upon: About four Years after the Marriage, *Bayly* makes his Will, and at the same time, proposes a Bond for *Eyton* of 3000 *l.* conditioned for the Payment of 1500 *l.* to him at such a Time, and then sends for *Eyton* and his Wife, shews them the Bond and Will, whereby he had likewise given them a Legacy, but never delivers the Bond to *Eyton* or his Wife, but kept it in his own Custody; and *Bayly* some Time after dying suddenly, this Bond was found among his Writings, and by Agreement, was delivered over to *Lowen*, who was a Defendant, to be kept by him as an indifferent Person, 'till it should appear how Things were like to go; *Bayly* dying in Debt considerably, his Executors renounced, and Administration with the Will annexed, was granted to the Defendant *Lowen*, as principal Creditor, for about 2000 *l.* by Simple Contract, and *Bayly* was likewise indebted to several others by Simple Contract; and afterwards *Eyton* became a Bankrupt, and this Bond of 1500 *l.* was assign'd by the Commissioners to the Plaintiffs, who were his Creditors; so this Bill was brought to have the Bond delivered up to the Plaintiff, and to have an Account of *Bayly's* Personal Estate, and Satisfaction thereout; for the said 1500 *l.* several Proofs were read on the Plaintiff's Part, to prove the due Execution of the Bond, and that seemed to be out of all Doubt; *Eyton* and his Wife being likewise examined as Witnesses, by Order of Court, did both by their Depositions and Answers, swear the Agreement by *Bayly*, to pay or secure 4000 *l.* for the Wife's Portion,

On the other Side, 'twas proved, that if this 1500 *l.* should be taken out of *Bayly's* Assets, there would not be enough to pay above 4 *s.* 6 *d.* in the Pound to his Creditors, so the only Question made, was, Whether the dead Daughter's Portion should survive wholly to the other Daughter, or be distributed between her and her Mother, according to the Statute? And as to this, a Difference was taken, and agreed to by the Court, that as to the Orphanage Part, which belongs to the two Daughters by the Custom of *London*, the Survivor should have the whole, even after a Division and Partition made between them; but as to the Testator's Part, devised to them, that was under the Direction of the Statute, as a Legacy, and must be between the Mother and surviving Daughter accordingly.

And as to the other Part, the Court was of Opinion, that the Bond was to be looked upon as voluntary against the Creditors of *Bayly*, but my Lord said, that the Agreement to pay or secure 4000 *l.* in Consideration of the Marriage, though 'twere only by Parol, and by Consequence, not binding within the Statute of Frauds and Perjuries, yet it was binding in Conscience, &c. and so far, as *Bayly* afterwards executed that Contract, by Payment of Part of the Money agreed upon, it was

an effectual Performance, and not to be set aside in a Court of Equity; and he would never call that fraudulent, which was just; but as to the 1500 l. Bond, you can't tack that to the Parol Agreement, so as to make it any Evidence in Writing of that Agreement, or as a Performance of it; for that appears to have been given four Years after, and without any Application of *Eyton* or his Wife; besides, if it be intended to be in Execution of the former Agreement, 'tis natural to suppose it would have been immediately delivered only to the Obligee or his Wife, which here it was not, *Bayly* the Obligor kept it by him, it was made at the same Time with his Will, shewn to them, and after his Death, found with his Will, and so he could not take it otherwise than in the Nature of a Legacy, and voluntary, and so delivered an Account to be taken of *Bayly's* Personal Estate, and that to be apply'd in the first Place, towards Payment of his own Creditors, and if any Surplus remained, the Plaintiffs were to come in for a Satisfaction of their Bond, in the next Place, before the Legacies of *Bayly*; and Costs of all Sides to come out of *Bayly's* Personal Estate, he being the Occasion of this Suit; but the Plaintiffs thought there would be no Surplus at all, and so desired 'till *Monday* to consider whether they would not chuse to have this Bill dismissed, rather than enter into the Account, and the Chancellor gave them Time accordingly.

Tipping *versus* Piggot.

What Act of
a Trustee
shall defeat a
Trust, or de-
stroy contin-
gent
Remainders.
See 1 Chanc.
c. 49, 213.
2 Chanc.
c. 64, 78.
1 Chanc.
Rep. 68.
1 Vern. 13,
181, 440.
2 Vern. 133,
303, 583,
702, 754.
2 Salk. 680.
1 Lev. 237.
2 Vent. 350.
Also the
Case of
Trevor and
Trevor,
ante.

IN Consideration of a Marriage and 3000 l. Fortune, and for settling the Lands in Question, in the Name and Blood of the *Tippings*, a Settlement was made to the Use of the intended Husband for 99 Years, if he should so long live, Remainder to Trustees, during his Life, to support contingent Remainders; Remainder to the first, and other Sons of that Marriage; Remainders to the Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband. The Marriage took Effect, and the Husband and Wife and Trustees for Support, &c. by Fine and other Conveyances, settle these Lands to the Husband for 99 Years, if he should so long live; Remainder to Trustees during his Life, to support contingent Remainders; Remainder to the Wife for her Life, for her Jointure; Remainder to the first and other Sons of that Marriage; Remainder over to several others; Remainder to the right Heirs of the Husband; then the Husband and Wife die without Issue, and this Bill was brought by the Plaintiff, Heir at Law to the Husband, to set aside that second Conveyance by the Trustees, as being made in Breach of their Trust, and insisted, that they were Trustees, as well for the Support of the Remainder, as to the Remainder of the first, and other Sons, all being contingent Remainders, and that such Conveyances ought to be set aside; and so has been the Practice of this Court, at least the Opinion of this Court for these 20 Years, though indeed Serjeant *Pemberton*, and several other eminent Conveyancers have held, that by the Trustees concurring in any Act to prevent the rising of the contingent Remainder, they were for ever destroyed and gone; but that Opinion is now exploded in this Court.

And

And the Chancellor held it to be so, as to the first and other Sons, ^{Curia.} who came in, and were to be considered as Purchasors under the Marriage Settlement and Portion, and said it would be dangerous for any Trustees to make the Experiment; for that it was most certainly a Breach of Trust, and if it should ever come in Question, he thought this Court would set aside such a Conveyance; not but that he said the Case might possibly be so circumstanced, as that this Court would not relieve against it: But where Relief is to be given, in such Cases, it is only to those who come and claim as Purchasors as the first and other Sons. All the Remainders after to the Heirs of the Body of the Husband, and the Remainder to his right Heirs, as merely voluntary, and not to be aided in the Court; and so dismissed the Bill, *vide i Leo. 237. Jenkins and Keymis, Semble que le Portion sur Marriage extends a les Remainders coment que coient per second Venter.*

Limondson *versus* Sweed.

IN this Case the Court declared, and the Council agreed likewise, that if a Man bring a Bill for a specifick Performance of a Parol Agreement, setting forth the Substance of it in his Bill, and the Defendant by his Answer, confesses the Agreement, that the Court may in such Case decree an Execution thereof, notwithstanding the Statute of Frauds and Perjuries, because the Defendant confessing the Agreement, there can be no Danger of Perjury from the contrariety of Evidence, which was the only Mischiefe that Statute intended to obviate; but in the principal Cause, the Defendant had not by his Answer, confessed the Agreement charged in the Bill, which was only by Parol, to settle some Lands and Houses on the Plaintiff, in Consideration of his marrying the Defendant's Daughter; and so the Bill was dismissed, and 'twas said, in all Cases, wherever the Court had decreed a specifick Execution of a Parol Agreement, yet the same had been supported, and made out by Letters in Writing, and the particular Terms stipulated therein, as the Foundation for the Decree, otherwise the Court would never carry such an Agreement into Execution.

A specifick Performance of a Parol Agreement decreed, notwithstanding the Statute of Frauds, &c. See 1 Vern. 151, 159. 2 Vern. 373. Abr. Eq. 19, 20.

Brander *versus* Robs.

THE Plaintiff was Assignee of Commissioners of Bankruptcy, if sued out against one *Botville*, who was a Gunpowder-Maker, and had contracted with the Defendant for as much Salt Petre, as came to 224*l.* but not having ready Money to pay for the same, proposed to make a Mortgage of an Estate he had in his own Possession, by Way of Security for the Money; and in order thereunto, left with the Defendant the Title Deeds, to get the Assignment drawn; the Defendant carry'd the Deeds to an Attorney, to look into the Title, and draw the Assignment, and the Attorney kept them by him for some Time, and

An Agreement, &c. for a Mortgage by one before his Bankruptcy made void, Q. See 1 Chanc. c. 78. 2 Vern. 96, 97, 194, 432. and the Case of *Jacobson*, then &c. *postea*.

then died without having drawn the Mortgage, after which the Defendant carry'd the Deeds to a Scrivener for the same Purpose; but before the Assignment was perfected, the said *Botville* became a Bankrupt; and now the Plaintiff Assignee of the Commissioners brought his Bill, to have the Deed delivered up, that so the Estate might be sold for the Satisfaction of Creditors; the Defendant by his Answer, insisted upon the Matters aforesaid; his Council argued, that this was more than a Pledge of the Writings, that an Assignment was intended to be made, and if it had been made, this Court would not have taken it from him, without paying the Money, that its not being made, was only an Accident occasioned by the Death of the Attorney, and this Court often relieves against Accidents, and so the Plaintiff ought not to have the Deeds without Payment of the Money; but the Court decreed the Deeds to be brought before the Master, and to be delivered by *Schedule* to the Plaintiff with Costs, though no Reason was given for this Decree, *sed hoc Dur' a multis habebatur.*

Andrews *versus* Craddock.

28 Nov.

1713, J. G.
in Court.

Bill by *prochein Amy*,
without the
Infant's Con-
sent. See
Abr. Eq. 72.
2 Vern. 711.

IN this Case, 'twas held by the Council, and agreed to by the Court, that any one may bring a Bill as *prochein Amy* to an Infant, without his Consent, because it is at his Peril he brings it, and he is to be answerable for the Event; but none can bring a Bill in the Name of a Feme Covert as her *prochein Amy*, without her Consent, and if such Bill be brought, upon her Affidavit of the Matter the Bill will be dismissed.

Manfield *versus* Dugard.

5 Feb. J. G.

1713, in
Court.

Devifes to his
Wife 'till his
Son be 21;
the Son's
Death at 13,
determines
the Wife's In-
terest. Abr.
Eq. 195.

IN this Case a Man had by his Will in Writing devised to his Wife certain Lands, 'till his Son and Heir apparent should attain to the Age of 21, and when his Son should attain to the said Age, then to his Son and his Heirs, and dies; the Son lives to his Age of 13, and then dies; and the Wife supposing she had a Title to hold the Lands 'till such Time as he might have attained his Age of 21, continues in the Perception of the Rents and Profits of the said Lands for several Years; and this Bill was brought against her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and the Wife was the Executrix likewise of her Husband, yet it not being devised during the Time for Payment of Debts, nor any Creditors, nor want of Assets appearing, it was held by the Chancellor, that the Wife's Estate determined by the Death of her Son; and that the Remainder vested presently in the Son upon the Testator's Death, and was not to expect 'till the Contingency of his attaining his Age of 21 should happen, for then in this Case 'twould never have vested at all, he dying before that Age, and so decreed the Wife to account for the Profits from the Time of her Son's Death: And upon a Re-hearing his Lordship continued of the same Opinion, according to the

the Distinctions taken in 3 Co. 19. *Boraston's Case*; and 6 Co. 35. *Bishop of Bath's Case*; but said it being a Point of Law if they were not satisfied they might appeal elsewhere, for the Decree being sign'd and enroll'd, 'twas now too late for him to consider of it again; and the Rehearing was only for Matter of Costs taxed after the Decree.

East-India Company versus Clavell & al'

ON opening the Pleadings, the Cause appeared to be this; Sir Edward Littleton being appointed by the *East-India Company* to go as President to the Bay of *Bengal*, and to transact and Manage all the Affairs of the Company there, does by Articles dated Jan. 9, 1698, for himself, his Executors and Administrators, covenant and agree with the Company and their Successors to depart with the first Ship should set sail for that Place; and that after his Arrival there he would faithfully, and to the utmost of his Skill and Power, transact and manage all Things in Relation to the Company for their Benefit and Advantage, and would not embezel, misapply or convert any of the Goods or Effects of the said Company to his own Use, with several other Covenants relating to his Fidelity and good Behaviour in the said Employment; and at the same Time Sir Edward Littleton, together with Sir *Trencham Masters* and Mr. *Shepherd*, as his Sureties, became jointly and severally bound in a Bond of 2000*l.* Penalty conditioned for Performance of the said Articles; and this Bond, like all other Bonds, bound themselves, their Heirs, Executors, and Administrators. Afterwards, Sir Edward Littleton being to proceed on his Voyage, by Indenture of Lease and Release 20 & 21 Jan. 1698, settled all his Estate to Trustees and their Heirs, for several Uses, and amongst the rest, carves out a Term for 100 Years; and this was declared to be upon Trust, that the Trustees should raise the Sum of 5000*l.* as a Portion for his Daughter *Jane*, to be paid within three Months after Marriage; and likewise makes a Provision for the Payment of his Debts, and soon after set out for *Bengal*. During the Time of his Abode there he managed the Affairs of the Company, and had generally 2 or 300,000*l.* of their Money in his Hands. Mr. *Clavell*, the Defendant, to whom Sir Edward had recommended the Care of his Daughter, sometime after Sir Edward's Departure, makes his Application to her in the Way of Marriage; and she having the Copy of her Father's Settlement in her Hand, delivers it to Mr. *Clavell*, who went to Counsel to advise upon it, and being advised that the Portion of 5000*l.* was sufficiently secured by that Settlement, Mr. *Clavell* and the young Lady soon after married, but no Settlement was made upon the Marriage, though 'twas prov'd that Mr. *Clavell* had an Estate of Inheritance of about 700*l.* per Ann. and a Personal Estate of a considerable Value: Some time after the Marriage Mrs. *Clavell* died without Issue, and it being by her desired, she was buried among her Ancestors at a great Distance, which cost Mr. *Clavell* near 400*l.* After her Death Mr. *Clavell* the Husband took out Administration to her, and brought his Bill in this Court against the Trustees, and had a Decree for Sale of

§ May 1714.
J. G. in
Court.
A voluntary
Settlement
on a Daugh-
ter (after a
Bond, &c.)
made good by
Matter ex post
facto. See
2 Chan. Rep.
265. 1 Vern.
464. 1 Chan.
Ca. 59, 103,
170, and 216,
which seem
contra.

For the Plain-
tiffs.

the 100 Years Term, and for raising and paying the 5000 l. Portion. Several Purchasers bid for the Estate before the Master. The *East-India* Company, from Time to Time, upon Application to the Court, obtained interlocutory Orders to put off the Sale upon Pretence of bringing in better Purchasers, the Reason of which was this; Sir *Edward Littleton* had embezzled or misapplied Goods or Effects of the Company to the amount of 26,000 l. and so had forfeited his Articles and Bonds, and made himself unable to satisfy to the Company that Demand: And the Company had before that Time, by their Agents and Factors in *Bengal*, seized all the Books and Papers of Sir *Edward*, and taken himself into Custody, where he died; and so the Company conceiving themselves interested in the Estate, obtain'd the Orders before-mentioned, for putting off the Sale, and now at last brought their Bill against Mr. *Clavell*, the Trustees, and several others, to have an Account of the Real and Personal Estate of Sir *Edward*, and that the same might in the first Place be subjected to the making good their Demands. And for the Company 'twas insisted, that the Settlement for raising 5000 l. for the Daughter was merely voluntary and fraudulent; and tho' all voluntary Settlements were not fraudulent, yet this was apparently so, being made so immediately after the Articles and Bond given to the Company; that it must be intended that Settlement was made and approved of at the same Time, tho' made to bear Date five or six Days after; that it was to take away that which was to be the Fund for making good any Embezzlement or Misapplication of the Company's Money or Effects; that the Company were real Creditors for a very great Sum of Money, and prior in Time to the Settlement of the Daughter; that the Settlement was purely voluntary, and besides, the Daughter was since dead without Issue, and no Settlement had been made upon her, and so 'twas hoped this voluntary subsequent Settlement which was in Fraud of the prior Agreement and Articles with the Company, wou'd not prevail.

For the De-
fendant.

On the other Side 'twas urged the Articles only bound the Executors or Administrators; and tho' the Heirs are bound in the Bond, yet that should bring a Lien upon the Real Estate no farther than the Penalty of the Bond went, which was but for 2000 l. that there was no Pretence in the World to call that Settlement fraudulent, for tho' 'twas voluntary, yet 'twas made for very good and just Reasons, that Sir *Edward* was going a very long and dangerous Voyage, and in all Probability might never return again; that having only one Daughter, 'twas fit he shou'd set his House in order, and make some Provision for her before he went; that it appear'd not to be fraudulent in regard he expressly provided for the Payment of his Debts; that this to the *East-India* Company was at that Time no Debt at all, nor is any Presumption to be allowed that he would become so indebted in order to defeat his Settlement; that admitting the Settlement was voluntary at first, yet by an Act *Ex post facto* such voluntary Settlement may become good; and so 'twas in this Case; that Mr. *Clavell* was drawn in and invited by this Settlement to marry the young Lady; that he advised with Council before-hand, and was told 'twas effectual for the 5000 l. Portion; that in Dr. *Hart's* Case in this Court, and affirmed by the Lords,

Dr. Hart's
Case.

Lords, a Letter from the Father, promising to give his Daughter 1500 *l.* Portion was held to be sufficient, not only to exempt it out of the Act of Frauds and Perjuries, but was likewise held obligatory on the Father to perform it, because the Person was thereby drawn in and invited to marry the Daughter: That in our Case Mr. *Clavell*, tho' he made no Settlement, yet had a very good Estate, of which she would have been dowable if she had lived; that he had expended 400 *l.* on her Funeral to comply with her Request; that if this Settlement was voluntary in its Creation, yet being the Motive and Inducement to Mr. *Clavell* to marry her, this had now made it valuable; and so 'tis prayed they might have the Benefit of their Decree, and the Sale go on to the last and best Bidder.

Chancellor. I think the Settlement was a very reasonable, just, and *Curia.* honest Provision, and no Colour of Fraud in it; the Articles do not bind the Real Estate at all, and the Bond only so far as the Penalty goes, which is but 2000 *l.* so let an Account be taken of the Real Estate of Sir *Edward*, and what of his Goods and Effects came to the Hands of the Company upon the Seizure, and if that falls short of the 2000 *l.* the Deficiency must be made good in the first Place out of the Sale of these Lands prior to the Defendant *Clavell's* Demands, and 'till that Account be taken let 2000 *l.* of the Purchase Money be brought before the Master, and placed out at Interest to abide the Event of that Account, and the Residue to be applied to Mr. *Clavell's* Demand of 5000 *l.* and all Parties must join in the Sale; and reserved the Consideration of Costs 'till the Account taken.

Bontell *versus* Mohun, Tilden, & al'

THE Plaintiff's Bill was to have an Account of the Personal Estate of *Ann Mohun*, the Defendant's Testatrix, and Satisfaction thereout of the Sum of 400 *l.* and likewise to have an Account of the Rents and Profits of the Estate in Question, from the Death of the said *Ann Mohun*, and upon the Defendants Answers and Proofs read in the Cause, the Case was this: *Ann Birch*, the Plaintiff's Grandmother, and Mother of the said *Ann Mohun*, being seized in Fee of the Estate in Question, and possessed likewise of a Personal Estate to the Value of about 2000 *l.* died intestate several Years since, after whose Death the Real Estate descended to the Plaintiff, and the said *Ann Mohun*, her Aunt, as Coheirs, and the Personal Estate came likewise between them equally as next of Kin; the Plaintiff sometime after being sick and infirm, and intending to go to *Mountpellier* in *France* for the Recovery of her Health, releases and conveys her Moiety of the Estate in Question to her Aunt and her Heirs, in Consideration of 400 *l.* secured to her by her Aunt's Bond, but having a great Confidence in her Aunt, she leaves this Bond with her, and then goes to *France*: Afterwards *Ann Mohun*, by Indenture of Lease and Release 25 & 26 of *March*, 1700, conveys the Estate in Question to one *Pepper* and his Heirs, to the Use of himself, his Executors and Administrators for 99 Years, if the said *Ann Mohun*, and the Plaintiff *Bontell* her Niece, or either of them, should so long live,
Remainder

Of Devises
by Implica-
tion. See
1 Vern. 22.
2 Vern. 451,
572, 723.
2 Vent. 223.
Cro. Jac. 75.
Moor, 635.
Vaugh. 259,
365.

Remainder to the Use of herself and her Heirs, and declares the Trust of the Term to be, that the said *Ann Mobun* should receive the Rents and Profits thereof for so many Years of the Term as she should live: Then comes a Proviso, that if the said *Ann Mobun*, her Executors or Administrators, should pay the Plaintiff the Sum of 400*l.* secured to her by way of Bond, and likewise by Indenture of Release, even bearing Date herewith, &c. as the Will expressly describes it to be; then after by another Clause in the Will, she devises the Estate in Question to the Defendant *Henry Mobun* (who was her eldest Son and Heir) and the Heirs of his Body after the Death of the Plaintiff (the said *Elizabeth Bontell*) with Remainder over, and dies. The Defendant *Henry Mobun* enters, and suffers a Common Recovery of the Estate, and limits the Uses to himself and his Heirs; and now the Plaintiff brought this Bill to have Satisfaction of the 400*l.* and Interest, and also an Account of the Rents and Profits of his said Real Estate from the Death of his Aunt: And *Henry Mobun* brought likewise a Cross Bill to be let into the Redemption of the Term upon Payment of the 400*l.* and Interest; and the single Question was, Whether the Plaintiff was to have the Estate for Life by Virtue of the Devise to her for Life by Implication? Or, whether that Clause meant no more than only to continue it a Security to her for the 400*l.* and Interest; the Plaintiff had one Witness to prove that her Aunt had declar'd she should have the Estate for Life.

For the Plaintiff.

And 'twas argu'd for her, that this Devise gave her an Estate for Life by Implication, and the Implication to her was necessary, being devised to the Defendant, who was her Son and Heir, but not to take Place 'till after the Plaintiff's Death, and consequently the Plaintiff must have it during her Life, because no one else could; that the 99 Years Term was a Security for the 400*l.* for if that was determinable upon the Death of her Aunt she had had no manner of Benefit of that Term; that tho' the Proviso had made it in the Nature of a Mortgage redeemable upon the Payment of the 400*l.* and Interest, yet that was not an absolute compleat Security for the Money; that this Devise to her for Life could not be taken to be of the same Nature with the Term, or as a farther Security for the Money, because she had in the first Part of her Will expressly devised the 400*l.* to the Plaintiff, and so had in a Manner paid or exonerated her real Estate of that, and tho' she took Notice that it was the same 400*l.* secur'd to her by Bond, and likewise by the 99 Years Term, yet that was only to prevent her claiming two several Sums of 400*l.* and so the Devise after of her Real Estate was absolute and independant, and must give her an Estate for Life by necessary Implication.

For the Defendant.

On the other Side 'twas argu'd, that this Devise to her by Implication cou'd be intended only to be of the same Nature with the Term, or as a kind of a farther Security to her for the Money secured thereby, that as the Term was redeemable by the Payment of 400*l.* and Interest, so the Estate by Implication must be of the same Nature too; that as she had the Term for her Life, 'twas but natural when she came to dispose of the Inheritance to her Son to give it him after the Plaintiff's Death, and proves only that she carried the same throughout the Will,

Will, and that the Plaintiff should be secure of her 400 *l.* and the Estate not to be taken from her till that was paid; that the Will was made on the same Day with the Deed, and expressly referr'd to the 400 *l.* Security by that Deed, and so her giving that Estate to her Son after the Plaintiff's Death could not be intended in Purfuance and Confirmation of the Estate the Plaintiff had before, which would have continued during her Life, and shews only that she would not seem to do any thing in Derogation or Prejudice of that Estate; and Mr. Gilbert argued, that even at Law the Books are, that the Implication in a Devise to disinherit the Heir must be a necessary Implication; that if the Devise had been to the Plaintiff at the Death of a Stranger, this would not have carried it to the Plaintiff for Life, because no necessary Implication, but that it might descend to the Heir at Law in the mean Time; that upon the Circumstances of this Case it might be reasonably intended no other Estate than what she had before the Term; that as that was for her Life, it was natural and reasonable not to give away the Estate 'till after her Death; that as the Term was redeemable, so must this Estate too, because it might be intended to be no others, and so no such necessary Implication of an absolute Estate in the Land, as is allowed in the Books of Law, to the disinherittance of the Heir.

And the Chancellor was of the same Opinion, and especially for that last Reason, that there was no necessary Implication, &c. and so decreed the Plaintiff her 400 *l.* and Interest, and dismissed her Bill as to the Account of the Rents and Profits, but without Costs, for the Colour she had to make such Demand.

Andrews versus Brown, & Ux.

IN this Case, 'twas held clearly, that if a Man has a Debt due by Note to him, or a Book Debt, and has made no Demand of it, so that he is barred by the Statute of Limitations; yet, if the Debtor after the six Years, put out an Advertisement, that all Persons who have any Debts owing to them from him, will repair to such a Place, they shall be paid; this though it were only general, and so may be intended of legal subsisting Debts only, yet amounts to such an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again; so if in that Case the Debtor has made his Will, and directed, that all his Debts shall be paid, or made any Provision for the Payment of his Debts in general, this likewise would revive such a Debt, and bring it out of the Statute, so that his Executors would be liable to the Payment of that Debt, among the rest; and 'twas said, it had been ruled so oftentimes, and that a little Matter would bring it out of the Statute, being to revive and restore a Right: *A fortiori*, if after six Years, the Debtor, upon Application of that particular Debt, acknowledges it, and promises Payment; this revives the Debt, and brings it out of the Statute, because as the Note itself was at first but an Evidence of the Debt, so that being barred, this Acknowledgment and Promise is a new Evidence of the Debt, and being

What will bring a Debt out of the Statute of Limitations.

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proved,

proved, will maintain an Assumpsit for Recovery of it, and in the principal Case, the Plaintiff recovered upon a Note of 300*l.* of *Valentine Duncombe*, Brother of the late Sir *Charles Duncombe*, to whom the Defendant's Wife was Executrix, given in 1688, payable to one or Bearer, and the Note had been handed from one to another, 'till at last *Valentine* became a Bankrupt, went to *France*, and long after the six Years, and Death of *Valentine*, Sir *Charles* his Executor recovering a Debt of five or six thousand Pounds, which was due to his Brother, put out an Advertisement, for all Persons who had Debts owing from his Brother, to come to him, and make them out, they would be paid; and the Plaintiff having this Note, prosecuted for the Recovery of the Money, soon after the Advertisement, but could not bring it to a Hearing 'till now; he had a Decree for the 300*l.* and Interest from the Time of the Bill brought, though my Lord said, this Bill was in the Nature of an *Indeb. Assumpsit* at Law.

Of the Difference of exhibiting Interrogatories in the Office, and before Commissioners. See 1 Vern. 253. 2 Vern. 472. 1 Chanc. c. 25, 228. 2 Chanc. c. 75, 79. and *Spencer versus Allen, Trin. 1718.* See above.

Another Point in this Case was, that after the Bill and Answer came in, and a Replication filed, several Witnesses were examined, and their Depositions taken, then the Plaintiff moved to withdraw his Replication, and took Exceptions to the Answer, and they reply'd and examined other Witnesses, and now on the Hearing, would read the first Depositions; but the other Side insisting, they could not be read, by Reason the Replication must be withdrawn, and so as taken without any Replication; they were irregular, and ought to be suppressed, and accordingly my Lord said, they ought to be suppress'd, for that as he said, they should have examined them anew, after the second Answer came in, and Replication filed, or have moved the Court to have Liberty to make Use of them at the Hearing.

A third Part in this Case was, wherein the Court and Bar agreed, that where Interrogatories are exhibited in the Examiner's Office, and Witnesses examined thereon, that either Part may, without Application to the Court, or Order for that Purpose, exhibit one or more Interrogatories, or a new Set of Interrogatories, for farther Examination of the same or other Witnesses; but where the Commission is taken out for Examination, there no new Interrogatory or Set of Interrogatories can be exhibited, without Motion or Order of the Court. And the Reason of the Difference was said to be, because the Examiner is an Officer of Credit, and sworn, and so presumed to be impartial, and that he will not disclose the Depositions to either Party; but the Commissioners are private Persons, and not sworn, and are called the Plaintiff's Commissioners or Defendant's Commissioners, and so without Leave of the Court, no new Interrogatories can be added before them.

Hunt *versus* Hunt & Ux' & al.

THE Defendant was Son and Heir apparent to the Plaintiff, who had an Estate of about 200 *l. per Ann.* and the Son Defendant, being about to marry *Elizabeth Wright*, who was not above 16 Years of Age, the Plaintiff by Lease and Release, 14 and 15 of October, 1708, settles and conveys his Estate to Trustees and their Heirs, as to Part to the Use of himself for Life; Remainder both as to that Part after his Death, and as to the other Part in Possession, to the Use of the Defendant for Life; Remainder to the intended Wife for Life, for her Jointure, Remainder to the first and other Sons, &c. in the usual Form; and in the Release was a Proviso, that if the Marriage did not take Effect, and *Elizabeth* should not when she came of Age, by Fine or otherwise, join in charging an Estate she was then entitled to, of about 250 *l. per Ann.* with the Sum of 2000 *l.* to be paid to the Plaintiff; then the Indentures of Lease and Release and Settlement, were to be void absolutely, and to all Intents and Purposes: The Marriage took Effect, and about half a Year ago, the Wife attained her Age of 21, but finding her own Estate of more Value than that settled upon her in Jointure, she and Husband refused to join in charging it with the 2000 *l.* whereupon this Bill was brought against them, and the Trustees to have a Re-conveyance.

On breach of a Condition or Proviso in a Settlement, a re-Conveyance decreed. See 1 Vern. 402, 430. 1 Mod. 36. 1 Vent. 199. 2 Vern. 359, 478. Abr. Eq. 106, &c.

'Twas insisted for the Defendants, that there needed none, because by the Proviso on the Defendant's Refusal, the Estate thereby limited to them was to cease, and be void; but the Court thought that not sufficient, without a Re-conveyance, it being in the Case of a Freehold.

Then 'twas insisted for the Plaintiff, and the Bill was for that Purpose likewise, that he might have an Account and Satisfaction for the Mesne Profits received by Defendants from the Time of the Settlement, and 'twas said, that by the Proviso of the Release, the Estate being to cease, and be void on the Defendant's Refusal, the Plaintiff ought to be restored to all Benefits and Advantages, which thereof had been made, and consequently to the Rents and Profits received by Defendants.

But not the Mesne Profits

But the Lord Chancellor decreed a Re-conveyance, and an Account of the Rents and Profits only from the Defendant's Refusal after his Wife came of Age, and no Costs on either Side, and said that it was no Condition precedent, but subsequent to the vesting the Estate in the Defendants.

Jenpor

Jennor *versus* Harper.

A charitable
Devise, by a
Parol Codicil. *Quere*
if good,
where Equity
will supply a
Defect, in
the Appoint-
ment of a
Charity. See
Abr. Eq. 97.
98.
2 Vern. 453,
597. 1 Chan.
c. 134.
1 Chanc.
R. 91.
1 Salk. 163.

ONE *Jennor* made his Will in Writing some time in the Year 1651, and afterwards, the 5th of December, in the same Year, makes a Codicil in Writing, and the same Day makes another Nuncupative one, (on which the present Question arose) and thereby devises out of his Lands and Estate, in such a Place, 20 *l. per Ann.* for the Erection of a School, and Maintenance of the School-Master for ever. This Nuncupative Schedule was after his Death, put into Writing, and proved as such by three Witnesses. The School was built, and a School-Master put in, and continued for several Years by the Executors of *Jennor*; but after the Heir at Law refusing to continue the Payment, no School had been there kept for about 30 Years past: But some Time since, a Commission for charitable Uses was taken out, and the Commissioners decreed the Devise good, and the Heir at Law to pay the 20 *l. per Ann.* according to the Nuncupative Schedule, and now upon Exceptions to that Decree, the Question was, whether this were a good Devise.

'Twas urged for the Charity, that this, though 'twere only a Parol Devise, yet 'twas a good Appointment, within the Statute of 43 *Eliz.* and that that Act made no Difference between an Appointment by Parol, and an Appointment by Writing; and that this being made before the Statute of Frauds and Perjuries, though 'twere only by Parol, and so not good within the 22 *Henry VIII.* was yet a good Appointment within the 43 *Eliz.* which being subsequent in Time, had repealed the former Statute as to this, and that a Devise by a Tenant Tail to a Charity, though not good against the Issue, upon the Statute *de Donis*, yet has been several Times held good against him as an Appointment by the 43 *Eliz.* which has abrogated that Act too, as to charitable Devices. But on the other Side, 'twas urged, that these Devices to Charities, as well as others, must be governed by some Rules; that by the Civil Law, if a Man devises a Charity out of his Personal Estate, and Legacies thereout likewise to others, and the Personal Estate fell short to answer all, the Charity should be preferred; but in this Court, that Rule will not hold, but the Charity must abate in Proportion with the rest; that since the Statute of Frauds, if a Man by his Will gave Lands to a Charity, yet if that Will was carried but imperfectly into Execution, and so was not good as a Will, it has been held not to be good as an Appointment, so was Dr. *Johnson's* Case; where there were but two Witnesses to a Will. Indeed, if a Man should make a Writing, on Purpose to Found a Charity, it might have another Construction; but when he makes a Will, and intends it to other Purposes, though he thereby appoints a Charity, yet if the Will be defective as a Will, it shall not operate as an Appointment to support the Charity; that it was a long Time doubted, whether a Will in Writing, though good in all Circumstances, should operate as an Appointment against the Issue in Tail; and if that was so much doubted to support a Nuncupative

pative Devise of Lands to a Charity would be carrying it still much farther, and Mr. Williams mention'd a Case in *Comb.* 28. where a Man sent for a Scrivener to make his Will, and directed him to give his Lands to such an one and his Heirs, upon Condition; the Scrivener wrote the Will, but before he had wrote the Condition the Testator died; and this was adjudged a void Will, for an absolute Devise it could not be, because the Condition was mention'd before the Man's Death; that the Reason a Devise by a Tenant in Tail to charitable Uses shall be good against the Issue, is, because the Testator had it in his Power by Fine and Recovery to bar the Issue and Remainder Men; and though he did not live to perform that Ceremony, yet as a Will being perfect and compleat by the 43 *Eliz.* it might work as an Appointment, for at Common Law there were no Fines or Recoveries, or Estates Tail, and therefore that Statute was therein a restoring of the Common Law; so a Deed of Bargain and Sale for Charitable Uses, tho' not good by 27 *H. 8.* for want of Enrollment; yet by the other Act 'twill be good as an Appointment, for that restores the Common Law; but no Resolution has ever gone so far as to support a parol Devise to a Charity out of Lands, because being defective as a Will, which was the Manner of Conveyance he intended to pass it by, it can have no Effect as an Appointment, which he did not intend: And my Lord Chancellor seem'd to be of the same Opinion, but said he would take Time to consider of it 'till the first Day of Causes after the Term, and in the mean Time recommended it to the Plaintiffs to make good the Charity.

Note,

Sir Charles Orby & al' versus Lord Mohun.

IN this Case, the Lord Keeper desired the Assistance of the two Chief Justices, and the Lord Chief Justice Trevor began to dissect the Question thus. This Case does arise upon the Settlement of Charles Earl of Macclesfield, who by Lease and Release 23d and 24th of April, 1683, settled all his Lands in Cheshire on Sir Henry Hobert and Robert Mason, Esq; and their Heirs; To the End, that a common Recovery should be suffered to the Use of himself for 99 Years, if he so long lived; Remainder as to part of the Premises to the Use of William Harbord, and Francis Charleton, Esq; for 300 Years in Trust, to raise 12000 l. to be disposed of, as the said Earl Charles shall direct; Remainder of the whole to Charles Lord Brandon his Eldest Son, for 99 Years, if he so long lived; Remainder to the first, second, third, &c. Sons of that Marriage, viz. Lord Brandon with Mrs. Mason, in Tail Male; Remainder to first, second, third, &c. Sons of the Lord Brandon, by any other Wife in Tail Male; Remainder to Fitton Gerard, second Son of Earl Charles, for 99 Years, if he so long lived; Remainder to his first, second, third, &c. Sons in Tail; Remainder to Earl Charles's Heirs and Assigns; then follows a Power to Earl Charles, Lord Charles, and Fitton severally, as they shall come into Possession, to make Leases for three Lives for 21 Years, or any other Number of Years determinable on three Lives.

2 Vern. 531,
542. 3 Chan.
R. p. 102,
Ec. of re-
serving an-
cient and
accustomed
Rents. See
6 Mod. 59.

Note, several Errors of this Case in 3 Chan. Rep. may be corrected by this Report.

In this manner, *viz.* 1st, Of all or any of the Lands, anciently and accustomably demised, whereof Fines have been usually taken, reserving the ancient, usual and accustomed Rents or more. 2^{dly}, Of all the other Lands, reserving the most improved Rents that can be got, and that the Tenants should seal and execute counter Parts of their Leases, and at the latter End of the Deed is a Declaration, that 'till suffering and perfecting the Recoveries, Sir *Henry Hobert*, and *Richard Masfon*, and their Heirs should stand, and be seized of the Premises in Trust for such Person and Persons, and for such Estate and Estates, as were therein before limited and declared. No Recovery was ever suffered, and the Estate in Law is vested in Sir *John Hobert*, the Heir of Sir *Henry Hobert*, who survived *Richard Masfon*. *Charles Lord Brandon*, was attainted of High Treason *Michaelmas* 1685, against King *Charles II.* Earl *Charles*, in *November* 1685, reciting his Power to dispose of 12000 *l.* by *Indenture* limits 8000 *l.* part thereof to his Daughter the Lady *Gerrard*, and 4000 *l.* to his Son *Fitton*, immediately after his Death. In 1687, the Lord *Brandon* obtained a Pardon, and a Writ of Error from King *James* the 2^d, but both being defective, (being for Treason against King *James*, and not against King *Charles*, as his Attainder was) yet Judgment for Reversal of his Attainders was pronounced, but not enter'd. In 1693 Earl *Charles* dy'd, and the Lord *Charles Brandon* entered, and took the Profits himself, (not permitting the Trustees *Hobert* and *Charleton* to raise the 12000 *l.*) and in *July* 1701, made his Will *inter al'* (in these Words) *My Will is, That if I should happen to die without Issue Male, I give, grant, devise, and bequeath all and every my Manors, Messuages, &c. in Possession, Reversion or Remainder to Charles Lord Mobun, his Heirs and Assigns for ever.* And dy'd the 5th of *November* following without Issue; after his Death, Earl *Fitton* entered, and being desirous to make Leases for the Benefit of his Family, being seized with a sudden Sicknefs when he had no Rent Rolls or old Leases to guide himself, as to the Reservation of the old Rents, (all or most of them being in my Lord *Mobun's* Hands, who refused to deliver them) made two Leases 21 *December* 1702, one Lease of one third Part of the Estate not anciently and accustomably letten, reserving thereon the best improved Rent; and the other of the other Parts, and in both, takes Notice of this Power generally, and that pursuant thereto, and to execute the said Power, he demises all the Lands in the said Settlement, to Sir *Charles Orby*, and Mr. *Orby*, severally and not jointly, reserving the several ancient and accustom'd Rents, but does not specify what those Rents are, and soon after Earl *Fitton* dy'd.

Lord Chief
Justice
Trevor's
Argument.
1st Question.

Lord Chief Justice *Trevor*. I am to give my Opinion on this Case, and to that End must take Notice, that there are two Points insisted on by the Council, for the Plaintiffs. First, as to the 8000 *l.* the Principal cannot be disputed; for my Lady *Gerard* made Lord *Charles* her Executor, and he made the Lord *Mobun* his Executor, and the only Question as to this is, whether it ought to carry Interest? And I think, upon the Power Earl *Charles* had of raising the 12000 *l.* it ought to carry Interest; for the Land was charged with it, and the Term vested in Trustees for the raising it, which they might have done, by mortgaging
or

or selling the Term, and it was to be paid at the Time appointed, which in this Case, was immediately after his Death; the Term is in Nature of a Mortgage, and though not mortgaged, or any Sale made thereof, yet that is not material; for it was payable at the Time of his Death, and so must carry Interest from that Time being then due, and must remain as a Mortgage in their or any other Hands; but I conceive a Deduction of Interest must be made from the Time *Fitton* had the Estate in his own Hands, as to the 4000 *l.* for he must not have Interest, because he received the Profits himself of the Estate, out of which it was to be paid.

The second and main Question, is touching the Leases, whether they are well made in pursuance of the Power in the Settlement. As to the first of these Leases, I shall not speak much, because it seems to be given up by the Council for the Plaintiff, and that a Reservation of the most improved Rents is so uncertain, that they will not at the Bar, contend for it. 2d Question.

As to the other Lease, in Case a Recovery had been suffered, and thereby a Power had come to him according to the Settlement, would the Lease be good at Law? That is the Question before us, and Sir *Charles Orby's* Council laid down as a Foundation, that although it be a Lease by one Deed, of all the Lands that were anciently and accustomedly demised; and also of all the other Lands that were not, that is to say, a Demise of all the Lands within the Power. If that should be construed as one Lease, and one entire Reservation, it must be void as to the Remainder Man; yet the Rents issuing out of all must be apportioned; and so 'twould be in Nature of several Leases, in Construction of Law; because if *reddendo singula singulis*, the ancient usual and accustomed Rents shall be construed to be reserved for the Lands not anciently demised, 'tis void only as to them. But I am of Opinion 'tis void as to the Remainder Man, for all the Lands; and it is to be considered, in what Manner the Rents are reserved, the Words of the Lease are *reserving therefore the several ancient respective and accustomed Rents*, and the Word (*therefore*) goes to all the Lands; as to the Case of *Fanfield and Rogers*, Cro. El. 340. And *Winter's Case*, Dier 308, which is the same in Effect. There the Devise was of all the Demesne Lands, and scite of the Manor, *ac etiam totum illud Manerium de Chansfield, ac omnia Terras & Tenement' eidem Manerio Spectan' habend'*, the said Scite and Demesns, and also the said Manor and Premises reserving, or yielding for the said Scite or Demesns one Sum, and for the Residue another. These don't come up to our Case, nor doth our Case come up to them, for *reserving therefore*, is for the whole, but say they, it afterwards comes and says, *the several ancient respective and accustomed Rents payable*, &c. that might do, if it might be construed payable out of any Part, when reserved out of the whole; but in *Knight's Case*, 5 *Cook*, 'tis resolved, that what comes after the Reservation, shall not sever it; and it was in that Case ruled, that what comes after the *Videlicet*, was but a Description of the Value: I mention this only, because I am doubtful whether it can make it several, as this Case is. But I deliver no Opinion as to that, because I go upon another Reason

son, and that taking it to be even a several Reservation, I am of Opinion it is a void Lease. In the first Place, I consider the Reservation of Rent is in general Terms, without ascertaining any Rent; and it has been argued at the Bar, that it is a good Reservation, because it is certain by Reference or Relation to a Certainty, & *id certum est quod certum reddi potest*; now I agree, the Argument will hold to some Purposes, and such a Lease may be good, when made by a Tenant in Fee Simple, because, by making out what the ancient Rent was, he may recover the same, and may distrain and avow for the ancient Rent, and as such Lease may be good, when it is made by a Tenant in Fee Simple, so in like Manner, it may be not good, and the Reservation thereon void. For if such Tenant in Fee, can't set forth the ancient Rent, or if he can set it forth, yet it will be void, if he can't prove what the ancient Rent is; for he must make out, that 'tis the ancient Rent; now here this Lease was not made by him that was Master of the whole Estate, and therefore it will differ very much from what may be made by a Tenant in Fee; for in Case of the Tenant in Fee the Lease will be good, and the Reservation good or void, according to the Proofs he can make of the ancient Rent; but in this Case, there must be such a Reservation as is effectual to all Intents and Purposes, and must not by any Means be uncertain; and by this Lease the Remainder Man possibly may or may not be able to ascertain, and prove what the ancient Rent was, or aver, that such a Sum as he avows for, is the ancient Rent reserved, so that he is under a Necessity of doing all these Things; and if he fails in any one of them, he can't recover his Rent, and it may not be in his Power to do it, for it depends upon Evidence, which is uncertain, and upon a Matter of Fact, which is also uncertain; and it may be the Rents anciently reserved were not the same Rents at all Times, but that sometimes greater, and sometimes lesser Rents were reserved, and this Power is over Lands where Fines have been taken, and consequently the Rent must be more or less, according to the greatness or smallness of the Fines, and no Doubt on the Tryal, the Tenant may shew, that another Rent than what the Remainder Man avows for, was anciently reserved, and so nonsuit him upon the Evidence, as often as he shall think fit to contest it, whereby he may come to lose his Rent; and this is the first Reason I go upon, that because of the generality and uncertainty of the Reservation, this Lease cannot be good against a Remainder Man.

My Lord *Mobun's* Council cited for their first Authority, the Case of *Owen and ap Rice, Cro. Car. 94*, which is very imperfectly reported there; for which Reason, Mr. Attorney-General got a Copy of the Record, which I have seen, and find, that the Reason given in the Book, seems to be a Mistake; for 'tis said to be a Lease of three Mannors, usually Let at 32 *l. per Ann.* wherein the Bishop reserved the usual and accustomed yearly Rents, and the other Rents and Services, at the Days and Times usually accustomed, and because he does not shew any Rent in certain, the Lease was held void; now that was not the only Reason, for my Lord Chief Justice *Vaughan*, in *Threadneedle and Linbam's*

Linbam's Case, 1 Mod. 203, mentions another Reason, that is, that whereas there were three Manors usually let, the Lease was but of two, for there is an Exception of one of them by the Record itself; it should seem to me, that they went on both these Reasons. The Case in Truth, was a Lease of two Manors, excepting the third under the ancient and accustom'd Rent, not specifying any; now the three Manors had been usually let at 32 *l. per Ann.* therefore taking both these Reasons together, the Lease was certainly void, because there never was any ancient Rent for two, but for three Manors; for if there had been 32 *l.* reserved for the two Manors, that had been undoubtedly good: And because I conceive that they did not go in that Case upon either of these Reasons singly, I think that Case can be of no Authority, nor is it of any Weight with me, for my Opinion herein.

See 2 Mod.
57.
3 Keb. 380.
Stat. 1 Eliz.
c. 19.
Sect. 26.

The Council on the other Side, cited the Case of *Lawson and Piggot*, which was on a Power reserved by a Settlement, by Mr. *Venables* of *Cheshire*, to make Leases of Lands anciently demised, reserving at least 12 *s.* for every *Cheshire* Acre, and thereupon a Lease was made by him of the Lands anciently demised, reserving all the Rent intended to be reserved; the Case came to be try'd at the King's Bench, where the Tenant who was Plaintiff, recovered, notwithstanding the Reservation was in such general Terms, and both the Chief Justices *Holt* and *Treby* agreed, it was a good Lease, and gave their Opinion accordingly; but that does not come up to this Case; for the Reservation by the Power intended may be ascertained, at least by every *Cheshire* Acre; 'tis known what a *Cheshire* Acre is, and by Admeasurements, may at all Times be ascertained, and depends not upon uncertain Evidence. There is another Thing, in my Opinion in this Case, which carries a great deal of Weight with me, and that is, though this be but one Deed, it must be construed as the Plaintiff's Council would have it, to be several distinct Leases, under such distinct Rents, as formerly all the anciently demised Lands were usually let at severally, under several distinct Rents: And it must be considered, that 'tis a great Estate, *et non constat*, how many Manors are contained therein; so that the Remainder Man (for I must have Recourse to my former Argument) must in his Avowry, aver what Lands were particularly demised upon that Lease, or otherwise, his Avowry will not serve him, for if he should declare for more or less, either of these two Mistakes will destroy it; because, that it is a several Lease, so that it seems to be at a mighty great uncertainty, and to be a Lease and Reservation, directly contrary to what the Power meant, and not any ways made for the Advantage of the Remainder Man, as the Power, by providing that Counter Parts should be sealed by the Tenants seems to intend; for by that, it must be inferred, that it was so provided, to the End the Remainder Man should know what certain Rents were reserved, and that too upon what certain Lands in each Demise. Now the Demise may amount to 20 several Leases, and there is but one Counter Part for all, so that he can't by any manner of Probability, nay it may be impossible for him to make out the several Rents and Lands: For first, he must have all the ancient Leases, which can't be presumed; for when the Leases are expired,

the Counter Parts are usually given up, and not regarded, and so may be lost; and therefore the Remainder Man would be put to infinite Uncertainty and Inconveniency; and it can't be presumed, that by this Settlement, 'twas intended he should be liable to any such Obstacles, but on the contrary, that he should not meet with any of them, and therefore it prudently fore-saw the Inconvenience, and provided a Remedy against it, that there should be a Certainty by Counter Parts of every several Lease, and in such Case, he would be enabled to come at his Rent; but here is no more than one Counter Part for all, whereas there may be 20 several Leases, and not one Rent for any of them ascertain'd, so that he had as good have none, since it can be of no Account at all to him. One thing more I must take Notice of, which has been offer'd, and that is, the Plaintiff's Council say, that if in this Lease, there had been a particular Rent reserved, it would not avoid any of the Inconveniencies I have mentioned, nor serve the Remainder Man to any Purpose; for though there be an ancient Rent reserved in certain, he must aver that it is the ancient Rent. But I think the Remainder Man need only aver, that it is the ancient Rent or more, and that is enough for him in that Case; but I must also shew, that there is a vast Difference, where a particular Rent in certain is reserved, and where not; for in this Case, he must not only aver it to be the ancient Rent, but also prove it to be so; and if the Tenant should prove another ancient Rent, that will not make the Lease void, but bar the Plaintiff in the Avowry; but in the Case of a particular Reservation, he must truly aver the same to be the ancient Rent; yet where he shews the particular Rent under the Tenant's own Hand, it is incumbent on the Tenant, to prove that it was not the ancient Rent, and if he should not so prove it, it will be presumed for the Plaintiff; and if he should, then the Consequence would be, that he will thereby avoid the Lease; which is absur'd to think that any Tenant will endeavour, when it is made for his Benefit, and if not the Rent, yet the Land in that Case would be recovered, but in this Case neither. So that there is a great Difference between those two Cases; in the one, he must not only aver that it is the ancient Rent, but prove it to be so; and in the other, he need only aver it to be the ancient Rent or more, and shew the Counter Part, and the Tenant if he will, must make the Proof (for it lies on him) to the contrary, which if he should, would avoid his own Lease; and so 'tis every Way better for the Remainder Men to have a particular Demise, and a particular Reservation. Upon the whole, I think this Lease not agreeable to the Intention of the Settlement, and so it can't be good at Law.

Chief Justice
Holt.

Holt, Chief Justice. The Case has been truly stated, and opened at large by my Brother *Trevor*, and I agree in the Point of the Interest of the 800 *l.* to be paid from the Time of the Death of the Testator, for then the Money is due; 'tis a Charge commencing then, and he that takes the Profits, must pay the Interest; and there ought to be a Deduction for Interest all that Time that *Fitton* enjoyed the Lands, because he had the Profits that should have paid himself the Interest, and therefore he must take it by way of Retainer; But as to the Lease, I'm of Opinion, that 'tis a good Lease for all the Lands anciently and accustomably let-
ten;

ten ; for the rest, the Plaintiff's Council do not contend ; The Case is upon a Settlement made, wherein there is a *Power for the Tenant for Life, to make Leases of Lands anciently letten upon Fines taken, reserving the ancient and accustomable Rents* ; and a Lease of those Lands is made in the very Words of the Settlement. And first, I will consider, whether a Lease made by such a Power be good, reserving and rendering Rent in this Manner, and in Order thereto, I will secondly, (though it does not go directly to the Matter in Dispute, but for the good of Posterity, and which may give more Light hereafter) explain what is meant by these Words in a Settlement, or Lease, &c. *ancient and accustomable Rent*. Thirdly, I will consider where Lands anciently demised severally, and Lands not anciently demised severally, or altogether compiled in one Deed, whether that be not as well, as if they had been demised by several Deeds. And first, considering the Power, 'tis thereby said *yielding the ancient and accustomable Rent*, and 'tis not deny'd, but that the Power is certain ; now will any Body say, that a Reservation, pursuing the very Words of the Power, is not as certain as the Power ; if not, I am sure the Power itself must be void, and if it be not uncertain in the Power, I am sure it can't be so in the Reservation ; for the same Words must have the same Sense in both ; and general Words, though they don't refer to any certain particular, are sufficient, and so is the Case of *Ameridith*, cited 9 Co. 29. in the Abbot of *Sbata Marcella's* Case, and indeed is the very Case in Point ; King *Henry VIII.* being seized in Fee of the Manor of *Stepenham*, and Hundred of *Cole-ridge*, in the County of *Devon*, late Parcel of the Possessions of *Margaret*, Countess of *Sarum* (*inter Alia*) grants the same to his Queen *Catharine* for Life, and by another Patent granted to her for Life, to have in the said Manor and Hundred *bona & catalla felonum*, &c. *Fines*, &c. *Royal Filhes*, &c. *Ann' Diem & Vast'* with many other Royal Privileges and Exemptions, and afterwards the same came by Descent to Queen *Mary*, who in the first Year of her Reign, granted the same Manor and Hundred to the Earl of *Huntingdon*, and his Wife, and that they within the said Manor and Hundred, should have *Tot talia, tanta ead' & bu-jusmodi Libertates, Privilegia, Franchisas, Jurisdictiones*, &c. *quot qualia quanta*, &c. *quæ pred' Comissa Sarum aut aliquis vel aliqui Premissa aut alq' inde Parcellam ante habentes possidentes aut Scisiti inde existunt unq' habuer' Tenuer' aut gavisi fuer' &c. infra Premissa*, &c. *Ratione vel pretextu alicujus Charte Doni seu Concessionis seu aliquarum Literarum Patent'* &c. in Tail Male, the Remainders over in Fee ; the Question was, if the Patentee should have all the Franchises which were granted as aforesaid to Queen *Catharine* ; and there was the same Objection, that the Reference was general, and too uncertain ; but the whole Court of *Exchequer* resolved it was certain by the Reference to the Charter of Queen *Catharine* ; tho' it did not refer to the Charter, but by general Words (*prout aliquis seu aliqui, &c.*) and that such general Reference was as much in Law, as if the Letters Patent had been all recited therein : Now if such a Grant was good in the Queen's Case, much more shall it be good between Subject and Subject ; and it would be a great deal harder to construe it void in this Case, than in the other.

Secondly, It is a good Lease for this Reason, that by this Reservation the Rents are as certain as they can be; and 'tis not the reserving a Sum certain that is requisite to make it certain; for even upon a certain Sum, or a particular Rent reserved, it must be mentioned to be the ancient and accustomable Rent, or more; it is not what is reserved, as to the Sum that is requisite; but that it be the antient Rent or more: So that the bare Reservation of a Sum only, does not make it good: In *Whitlock's Case*, 8 Co. 69. b. there is the Pleading: And tho' he may take his Remedy by Debt or Avowry, yet 'tis plain in Avowry the Tenant must aver, that it is the antient Rent, unless the Defendant will take upon him to aver the same; so that there will be no such Hazard as is pretended; and therefore I am of Opinion, that a Reservation by such general Words is good. My Lord Chief Justice *Trevor* agrees with me, that if it had been made by Tenant in Fee-Simple, such a Lease with such a Reservation might be good; if in one Case, I don't see why it should not in the other; but I take it, that he must aver the Sum he declares for to be the ancient Rent in both Cases. Sir *John Mollins's Case*, 6 Co. 6. a. is a Case in Point, for there *Tenendum de nobis, &c. per Servitia inde debit & de Jura Consueta*, must be made good by Averment, as in this Case. There is an Objection made that it will be troublesome and inconvenient to him in Remainder; I don't see how; and if it were, he ought to take the Estate as it was intended him. But 'tis said he will, or may be, at a great Loss to find out and prove what was the antient Rent: I would know who can do it better than he to whom all the Counter-Parts, Rent-Rolls, and Evidence of the whole Estate must come, together with the Land, and all the Writings are all of Course in his Hands, so that the Trouble, if any there be, can't signify any thing; no Body can know so well as himself; and if he will distrain, he must avow and aver, and may easily give Evidence, what was the ancient and accustomable Rents. I take the Reason of *Owen and Ap Ree's Case*, Cro. Car. 94, to be clearly with me; 'tis said not to be intelligibly reported by Mr. Justice *Cro.* But that was not his Fault; for 'tis mistaken in the transcribing only, because he wrote a very ill Hand: Mr. Attorney has got a Copy of the Record, and the Case was this: There were four Manors usually let at 32 l. yearly, and the Bishop Leases, three of them rendering the ancient Rent; now that was nothing, and so not good, for no such ancient Rent had been reserved, for the three Manors at 32 l. and it could not be help'd by Apportionment, but it had been good by reserving it in this Manner, viz. rendering the ancient and accustomable Rent for the said three Manors, and also for the fourth; and that is the very Case before us. It is argued, that such a Lease can't be made, as to take Effect, by any but by the Tenant in Fee: Now pray see the Difference. This is the same in Effect, it being made by a Power derived from him, that has the Fee, and the Lessee is in mediately though not immediatly (which will make no Difference here) from him that has the Fee; that is, the express Resolution of *Whitlock's Case*, 8 Co. 71. a. for the Power is reserved to the Tenant for Life, and none other, who, in Case the Settlement had not been made, wou'd have been Tenant in Fee, and the Power reserved in him, favors strongly of
of

of that which he would have had with the Fee ; 'tis as if *Charles* Earl of *Macclesfield* had made it before the Settlement, (or if he had made it after the Settlement, when he was in the same Plight in all Respects, as *Fitton* was, when he made it, that would have been the same Thing) for being made by the Tenant for Life, who was invested with the Fee, 'tis the very same Thing to all Intents and Purposes, and as good, as if it had been made by him, who was immediately Tenant in Fee Simple in Possession.

Now there remains only to shew, that the ancient Rent may be ascertained, and what was meant by these Words *ancient and accustomed Rent* in the Settlement ; and I take it, that is the Rent, and shall be at all Times so understood, that was reserved at the Time of the Creation of the Power, where a Lease was then in Being, or that was last before the Time reserved, where there was no Lease then in Being ; for he that creates the Power, intends no more, than that the Lessor and Lessee shall not be able to put the Estate in a worse Condition, but keep it in the same Plight and Condition, at least, that it was in when so settled. Now suppose anciently there have been variety of Rents reserved, as for Instance, 19 *l.* for many Years anciently, and 20 *l.* for some few Years before the Settlement, and at the Time thereof, the Lands were not in Lease ; in that Case, the 20 *l.* and not the 19 *l.* though a much ancients Rent, shall be the ancient Rent ; for the Length of Time in that Case is immaterial, and for this, I depend upon a Case of undoubted Authority ; and that is the Case of *Morris and Antrobus* in the Exchequer ; 'tis in *Hard.* 325, and was quoted at large by my Brother *Che-*
bire at the Bar, and was thus : The Canons of *St. Paul's* made a Lease
13 Car II. for 21 Years, of the Rectory of *St. Gregory's*, to the Plaintiff
and his Wife, rendering 38 *l.* per Ann. and a Couple of Capons ; the
Rent had been at first 25 *l.* then 37 *l.* then 38 *l.* and last of all 40 *l.* and
the Capons ; and then the Lord Chief Justice *Hale*, upon whose Authority I lean, held the Lease to be void, though it was a greater yearly
Rent, than any of the ancient Rents, except the last ; and consequently,
as he also declared in that Case, the usual and accustomed Rent, was
that upon the last Lease, and so must the Statute 1 *Eliz.* be expounded
on the Word *accustomed*, so that the ancient Rent is not to be taken in
this Case, in respect of Time past, but of Time to come ; I doubt whether I express myself so well as to be understood ; but I would say that
the Lease that was then or last before, in Being at the Time of such
Settlement, the Rent reserved thereon is the ancient Rent, in respect of
any Lease to be made pursuant thereunto ; as if a Lease was made four
Years ago at 4 *l.* and another be made now reserving the ancient and
accustomed Rent, that Lease of 4 *l.* in Respect of this Lease, which
was then a future Act to be done, is ancient, and the Rent thereof is old
Rent in Respect of the new Lease. I will suppose a Variety of Rents reserved
at several Times, as of 10 *l.* for 30 Years ago, and 20 *l.* 20 Years
ago ; yet the last Reservation of 20 *l.* must be the ancient Rent, otherwise
this Power can't be executed, and therefore *ex necessitate*, you
must bring it to some certainty, as I have done, to know what must be
intended by these Words *ancient, usual and accustomed Rent*, and for
that,

Vid. *Hard.*
325.

that, I depend upon the Case of *Morris* and *Antrobus*, as a Case in Point and the Reason of the Law is with me, and it will be no Answer to say, that *ex necessitate*, such a Construction was made there, because it was an Ecclesiastical Lease; and a Dean and Chapter once reserving a greater Rent than formerly, can never diminish it again; but Tenant in Fee Simple, may make Leases at 50 *l.* and afterwards at 10 *l.* and then, if he makes a Settlement, as in this Case, shall the 10 *l.* or the 50 *l.* be the ancient Rent? I hold that the 10 *l.* shall be; for *Majus* and *Minus* will not be any Alteration of the Case, nor varies it one Way or the other, as it may in the Case of a Dean and Chapter, who can increase but never diminish, which is not the Case of a Tenant in Fee; and what he might have done at the Time of the Settlement, made, and what he thought a Rent then sufficient, should, upon a Power reserved to him of his ancient Estate, be the Measure of his Intention, and without a Certainty, the Power can't be executed, by reserving even a Sum in particular: And so having dispatched this second Point, which though it is not a Thing that now comes directly in Question, yet I give this as my Opinion for a future Good, to be remembered, that upon any Settlement, where a Power is reserved to the Tenant for Life, to make Leases of the Lands in the Settlement, which were anciently and accustomedly demised, and whereof Fines have been taken at the ancient, usual and accustomed Rents for three Lives, or 21 Years, or any other Number of Years, determinable on three Lives; the Rent must be the same, and no other than what was then, or last before, reserved upon a Lease of the same Lands in Being, or which expired last, before the Time of the Settlement made.

3d Point.

The third Point is, that all the Lands in the Settlement are demised by one Deed, whereas the Intent of the Settlement was, that several Leases should be made of the several Manors and Farms, and so several Deeds and Counter Parts to be sealed by the several Tenants; but now, as they are huddled up altogether in one, they make but one Lease. To this I answer, that if the Reservation be several, notwithstanding their being compiled in one Deed, that can be in no Sort a Diminution of the Power: For suppose there are four several Farms, let at four several (ancient) Rents, as for Example, one anciently at 40 *s.* another at 20 *s.* another at so much, and the other at another Rent, and all comprised in one Deed, reserving the several Rents anciently reserved. Can any one say it's but one Lease, or one Reservation, or that it is not pursuant to the Power, and one Counter Part is as good and effectual as 20 Counter Parts; the Intent of the Settlement was, that the Reservation should be so certain, that he to whom the Rent was to come, might know how, and for what he was to declare: *Habendum* the four Farms at four Rents severally, and respectively for 99 Years if *A*, *B*, or *C*, should so long live, that was held a good Reservation within the Intent of the Settlement, so is the Authority of *Knight's Case*, 5 Co. 54. *Winter's Case*. *Dyer* 308; and the Case of *Tanfield* and *Rogers*, Cro. El. 340, is express, that several Reservations may be in one, and the same Deed, and that the Reservation here is such a several Reservation, and consequently the Lease good; for that which was not
anciently

anciently so demised, will not hurt the other, but must fall to the Ground. Lands anciently demised, and Lands not so demised, are letten in one Lease, reserving the ancient Rent for those that were anciently demised, &c. is a good Lease, and the Reservation for the other Land is void; and the contrary Opinion, is contrary to all the Rules of Law; the putting them in one Lease, will not be material to object; for by one Counter Part, he may see what are the several Rents reserved out of each Farm or Manor; but you'll say 'tis the reserving therefore, &c. In Joint-Words, that makes all but one Joint-Demise. The Words are *Demise, Lease, and to farm let, &c. reserving therefore, &c.* but with Submission, notwithstanding the Words are never so joint, yet they shall be taken severally, where they have a distinct Subject Matter to work upon. The Power is for the several Sorts of Lands or Estates, some demiseable anciently, others not, 5 Co. 7. in *Wincham's Case*, there was a Demise to *A.* for 10 Years of Black Acre, and a Demise to *B.* for 20 Years of White Acre, and afterwards a Demise by Indenture to a third Person of both for 40 Years, to commence after the Determination of the said several Demises: Here the last Demise being of both Lands, and that to *A.* expiring 10 Years before the other, 'twas held, that the joint Words in the last Lease, should have a several and respective Construction, & *reddendo singula singulis*, by the last Lease, the Term of 40 Years in Black Acre, should commence immediately after the Lease to *A.* expired; and in White Acre, after the Lease to *B.* expired, that is one 10 Years before the other, and so it must of Consequence to all Intents, be a several Demise by joint Words in one and the same Deed, of the several Lands in the like Manner: In this Case, the Lands are several, and the Demise must be several by the Deed, because we must, to make a right Construction, look back to his several Powers, and it will be very hard to construe this to be a void Deed of Demise, where it may be construed to be a good one, and the Words are as exprefs, as can be to make it several; he says *severally and distinctly*, and so he demises them severally, and means to do it according to his Power, and not otherwise. These Words have been slighted at the Bar, but they ought not to be rejected, for they are very material. This Lease he makes in pursuance of his Power, and it would be a strange and hard Construction to say, that according to his Power, he did demise these Lands *jointly*; when in exprefs Terms he says, that *according to his Power, he demised them severally*, as he ought to have done. 5 Co. 18. *Slingsby's Case* is exprefs, that Several Words are void, where they would work on a Joint-Interest, and Joint-Words are void, where they would work on a Several-Interest, but Joint-Words in a Covenant, make it Joint, and several, and work severally; and plainer Words can't be spoken than in this Case; for he says *severally and not jointly, i. e. several Terms of Years*. It has been said, that a Power of this Nature ought not to be taken favourably, it being in Prejudice of the Remainder Man; I confess, I know not why, for if he that would otherwise have been Tenant in Fee, becomes Tenant for Life by such a Settlement, whereby a Power is reserved to him, that would have descended with the Fee, it ought to

to be taken beneficially for him, and that Power has a Relish of the ancient Fee. So 6 Co. 17 c. Sir Edward Clear's Case; That very improper Words may serve to execute a Power; Clement Harwood seized of three Acres of Land of equal Value in Capite, levy'd a Fine of two of them, to the Use of his Wife for Life for Jointure, and afterwards makes a Feoffment by Deed of the third Acre to the Use of such Persons, &c. and of such Estates, &c. as he should appoint and limit by his Will in Writing, and accordingly devised it to a third Person in Fee; here, though it could not be good as a Devise, but utterly void, inasmuch as he had conveyed two Parts before, by Act executed, yet it was held a good Execution of his Power, because it ought to have a favourable Construction; and therefore *ex necessitate*, the Judges there had Recourse to his Power, that it should pass by Way of Limitation of the Use, even though he took no Manner of Notice thereof by his Will, but devised the third Part generally in Fee: So here, if this Lease can't be good, as a Joint Demise of all the Lands in the Settlement, yet it may be good as a several Demise of the several Sorts of Lands therein, and it should be construed to be a several Demise, though it had been demised joint, as it is not, and so make it a good Execution of the Power, and consequently a good Lease, *ut res magis valeat quam pereat*. So in Hob. 312, Kibbet and Lee's Case, the Devise which was void as an absolute Disposition of the Estate, was construed a good Revocation in Execution of the Power, though no Notice taken of the Settlement therein, because such a Power must be always construed favourably, and with a beneficial Intent for the Party, to whom it is reserved, in Consideration of the Estate, he has parted withal. So in Scrop's Case, 10 Co. 140. b. A Covenant to stand seized to other Uses than were in the Settlement, adjudged a good Revocation of the Uses in the Settlement, though not express'd; and the true Reason is, because such Power must at all Times have a beneficial Construction for him who is to have it: Indeed he must pursue the Circumstances, and the Form prescribed, as such a Reservation, Counter Part, &c. but he need not take any Notice even of his Power; and if he should make a Lease without mentioning it seemingly as a Proprietor, that shall be construed as if it had been done by Virtue, and in pursuance of his Power, if it could by any Means be done by Virtue thereof, and so are all the Authorities; so that I conceive, that there is nothing omitted that is requisite to make this a good and effectual Lease, according to the Settlement; and I think it to be such, and ought to be construed as Several Demises.

Lord Chancellor
Cowper's
Argument.

Lord Chancellor Cowper. The Case has been stated distinctly and clearly by my Lord Chief Justice Trevor, and my Lord Chief Justice Holt; and as to the first Point, I concur readily with both their Lordships, because the Creation of the Term from the Death of the old Earl Charles, is in the Nature of a Mortgage, and so consequently there must be Interest for the Mortgage-Money, from the Time it was payable and due, which was at the Death of the old Earl Charles; for the younger Charles was in Nature of a Mortgagor; and the Estate being charged when it came to him with the Money, he was bound only
as

as Tenant for Life to keep down the Interest as in the common Rule of Equity; if he redeems he is to pay but one Third of the Principal, and he in Remainder the other two Thirds, that's the Course of Equity; then when *E. Fitton* came into Possession he was not to pay Interest to himself, and so no Interest after that since, 'till the Time of his Death, at which Time the Interest will again revive.

But as to the second Point I hold, that the second Lease reserving 2d Point. for the other Lands, the most improved Rent lies under an absolute uncontroversible Uncertainty, and is of no Value to the Parties: The great Point arises upon this other Lease, which is made as well of the Lands antiently as not antiently demisable, and both which are demised in one Lease; and I must own, with Submission to better Judgment, that in this Point I differ in Opinion with my Lord Chief Justice *Holt*, and am of the same Opinion with my Lord Chief Justice *Trevor*; I took Time formerly to consider of it when I was Council and attended at the Bar, and because it was a Case *prima Impressionis*, I made a particular Observation of the Arguments at Bar on both Sides, and am now of the same Opinion I was then, and shall deliver it accordingly, making Use of my old Notes: But I must premise a few Things in order to come to the Point in Question; 1st. 'Tis agreed by both my Lord Chief Justices to be meerly a Question at Common Law, and not to have a different Determination in this Court from what it wou'd receive at the Courts below; and it is here now in the same Manner as if there had been a Special Verdict here before me, where Equity can't aid, nor will it help this Lease, it not being compleatly executed in all Respects; I speak this because the Council for the Plaintiff seem'd to direct something this Way, as if in Case any Thing were wanting it might be relieved here; and I am clear of Opinion, that it being a voluntary Execution of a Power not done upon a valuable Consideration, 'tis not a Matter by any Means proper to go before a Master, but must stand or fall as it can, for if it be good it must be decreed good, if bad it must be decreed bad, though never so inconvenient for the Remainder Man or Lessee; and so 'tis in the same Condition as if a Recovery had been suffer'd. 2^{dly}, As to the Reservation, the Question is not if it wou'd be void between the Lessor and Lessee; as 'twas argued very fallaciously at the Bar, for want of making this Distinction or Difference; *where made*, between Party and Party, it may be good, but to bind the Interest of a third Person or not is the Question, and whether it be within the Execution of the Power: Now by the Limitations set to the Power, it is plain they were made for the Benefit of the Remainder Man; I will easily grant that when he in Remainder for Life came into Possession, he might lease as he pleased; and as to him, the Reservation is not void, because it may happen to be recover'd; but to the Remainder Man it is void, because it may not happen to be recover'd; so you see by this Distinction 'tis not absolutely void for Uncertainty, but it is not absolutely and perfectly Certain; some Things are in their Nature uncertain, some Things accidentally so; and to argue that if such a Thing as this Rent is, be not uncertain, then this is certain; and if certain, then it is good to

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Compare the
Argument of
this with
Holt's Inte-
grity, ante.

bind the Remainder Man, is not a fair Way of arguing; the first will not follow, for there is a wide Medium between not absolutely uncertain and certain, for future Events may alter the Case here, so 'tis not absolutely uncertain or certain, as if he can be so able or so lucky as to pitch upon the Sum which was the antient Rent; and if he can also prove it to be so, and if it shall happen that the other shall not be able to prove that any other Sum was the antient Rent, then these three *If's* being so luckily with him it may be a good Lease, and he may recover his Rent; but on the contrary, if in any of these *If's* he should happen to be at a Loss, he can't be certain, but must fail, and the Lease is bad, so as to be absolutely void for Uncertainty, and the Remainder Man, for whose Sake the Limitations are intended, is no Party: Now as this Case is, 'tis possible it may never be reduc'd to a Certainty, for the Remainder Man may meet with Difficulties insuperable, and if any Uncertainty is in it, the Lease is void as to him; but to prevent any such Uncertainty, there may be reserved the antient Rent or more, and that's alternative, and then the Lease will be good, according to the Settlement. 'Tis said the antient Rent is certain, by referring it to the last Rent at, or next before, the Time of the Settlement, where no Lease was in Being: With Submission to greater Judgments I can't agree to that; supposing it were twice at a greater and once at a lesser Rent; I take the two former Leases to be the antient Rent, for the last might be made by him that had the Fee, who is not bound to reserve the antient Rent, but may let it for nothing if he pleases; here are Lands antiently demised, whereof Fines have been taken, so that here is a flat Impossibility to make that Distinction, because the Rents have, in all Probability, been more or less, as the Fines have been higher or lower. A third Thing I premise is this, That the Reservation and Deed being to be made upon a Restraint of the Power, must be taken strictly against the Tenant for Life, because of the limited Acts he is to pursue, and liberally for the Remainder Man, because that Restraint was intended for his Benefit; and there are Multitudes of Authorities in the Books, that such a limited Power is to be taken strictly against Tenant for Life, where the Restraints are put upon him for the Benefit of the Remainder Man, and if we should go on both Reasons together, it must still be taken for the Benefit of him in Remainder; and for this I insist on the Reverse of the Reason in *Mountjoy's Case*, 5 Co. 3. b. That was an Estate Tail created by Parliament, &c. he had a narrower Power by the Act than the Law would have given him as Tenant in Tail, therefore that must have a reasonable Construction, according to the Meaning of the Act: But *vice versa*, here the Power of Tenant for Life is by way of enlarging the Estate, and being in Augmentation of it must be taken strictly, and so it must be taken according to general and natural Reason; now according to that, this can't be a good Lease to bind the Freehold and Inheritance of the Remainder Man, for in Construction of Deeds the true genuine Sense and Meaning of the Parties must be attended to, and so we must consider each Part of the Power in the Deed; and that in respect of the Rent reserv'd, the Remainder Man must

must be in as good a Condition as the antient Persons that held the Estate enjoy'd the same; it was not intended that general Words, especially those mentioned in the Settlement, should be *verbatim* turned into a Reservation in the Leases, but the Intent provided for a Certainty to be had in every Reservation of what Rents should be reserved, and that to be in particular; so that he in Remainder might have a Remedy upon his Action for a Rent reserved certain, and in Terms as formerly had been used to be reserved for the Land, or at least, so as it might be reduced to a certain Rent by referring to a Certainty; and this is the plain and honest Meaning of the Parties, and not to involve the Remainder Man in perpetual Controversy and Uncertainty, as in this Case he is otherwise obnoxious to. 'Tis said the antient and accustomable Rents being reserved, there will be a certain Sum reserved; but here 'tis disputable what the antient Rent was; and 'twas intended that a certain Sum should be reserv'd where the Rent wou'd be indisputable, for a certain Sum in all Cases must be reserv'd, and the contrary wou'd produce great Inconvenience, for always a certain Sum was antiently reserved, and so it was intended by having the Counterparts; and I rely upon it in this Case, that he is under greater Disadvantages than any Freeholder formerly hath been; for let us consider what it is that by allowing this Lease to be good the Reversioner must prove, he must prove the Lands and Rent he avows for to be within the descriptive Words of the Lease, and that the Lessor was in Possession, which he can't do here because 'tis promiscuous, and can't be known what Lands, for what Rent, but if there had been a Counterpart, the Lessee would be forced to say the Lessor was in Possession, and so the Lease wou'd be a Conclusion, at least an Evidence of the Rent, but here he must prove that such a Sum as he declares for, and neither more or less, was the ancient Rent, or the Tenant will baffle him as often as he pleases; the Rent here reserved is neither like, nor the same Reservation or Rent that used antiently to be reserved; and to argue, that though an express particular Sum had been reserved, the Tenant might put it upon him to prove, that it was the ancient Rent or more, and so he in Remainder, must prove what was the ancient Rent, although a certain Sum had been reserved, that is not to be argued; for 'tis a hard Supposition, that a Man should go about to destroy his own Lease he holds under, for so 'twould be; for otherwise, he can never avoid Payment in an Action of Debt for the Rent; and if in such Action, he should deny that to be the ancient Rent, the Lessor, or he in Remainder, might bring his Ejectment, and upon shewing the Denial upon Record, would recover the Land and put him out; now this Case varies here, for the Tenant may baffle the Lessor 20 Times over, and yet keep the Lands in despite of his Teeth; but if the ancient Rent had been reserved, there would be no Danger, and the Remedy as well as the Lease, had been good, but now he may shift here, as often as he can shew there was antiently any Rent reserved, which differs from that demanded. So that I must be of Opinion, that this Reservation in the Manner here worded, is reserving a worse Rent than used antiently to be reserved; and that the Restraint in
the

the Settlement means, that he in Remainder, shall have the same in all material Qualities, as well as the Quantity of the Rent, and a Remedy to attain to the Certainty, and to recover the Rent as well, as the former Freeholders could. There are many Cases put to this Point, in *Mountjoy's Case*, in *5 Cook*. And I take them all to be very good Authorities, because, being put by Council at the Bar, they were never deny'd to be Law; as a Reservation of Rent to be paid at two Days, where anciently it had been paid at four not good; so if paid in Silver, where anciently it had been in Gold, yet many others there put on other Points, were deny'd to be Law.

Fourthly, That this Lease, as against the Lessee, is not void, but against the Remainder Man it is void, because not so beneficial as usual; and a very Minute Difference will serve to avoid it, which might have been prevented in pursuing the Settlement, by reserving more than the ancient Rent; but here is none, and if there be, it must have all the beneficial Qualities of the Rent anciently reserved, and those ought to be respected, received and observed, as *Mountjoy's Case* says; and there are several Cases for want of that, deny'd to be Law, as Silver for Gold, or two Parcels or two Manors conjoyn'd, or a Part of a Manor at a proportionable Share of Rent, or part of the Rent; as if 20 Acres had been let for 20 Shillings each, of equal Value; it is not a good Lease if 15 of these are let at 15 s. Rent each; and our Case is much stronger, because the Original Parties to the Original Power, have laid a Stress on this very Thing, as if they foresaw and would prevent it; for the Lessee by that, is to execute and sign a Counter Part of the Lease, but the Deed here signifies nothing, 'tis a mere Shadow; and as the Manors were anciently parcelled out at distinct Rents, the Tenant may deny he holds any particular Parcel; he may say these and these Lands are not contained in any *Box*, (as I may call it) of *several Leases*, and insist upon any Rent he pleases, in 20 several Actions, brought by the Remainder Man, and may Non-suit him on the Evidence of every one of them, and he is estopp'd to say (nothing but signing and sealing) it was intended, that several Leases should be made, and several Counterparts, and several Rents certain reserved, &c. which can never ascertain that, for which the Settlement, and the Parties intended to provide.

Another Reason, or rather an Observation, which may serve to answer what my Lord Chief Justice *Holt* said, *That if the Settlement were certain, the Deed was as certain; and that the general Words in the Power are good for a Reservation*. But a true Way to execute a Power like this, is not to do it in the general Words of the Power; in all such Cases, they must reduce the Rent to a Certainty by particular express Words. Suppose, (as I have seen in some Deeds) that there was a Proviso in every Lease, there should be inserted such Covenants, as are usual to be inserted in Leases in that Country where the Lands lye, &c. and a Lease should be made with a Proviso in the very Words of the Deed, that would not be good; nor could it be aided by any special Verdicts, finding the Covenants usual, &c. and the Words *or more* alter it extremely, and the Lessor must lay hold on the ancient Rent, or more;

more ; whereby 'tis denoted, that in Obedience to it, he must do it one Way or other ; but still it must be certain.

A third Observation or Argument which I make is, admitting the Rent reserved not necessary to be a certain Sum, sure it must at least refer to an absolute Certainty, as in the Case of *Levison* and *Pigot*, there was an absolute Mathematical Certainty, than which nothing can be more certain ; for the Power provides, that it should be at least 12 s. for every *Cheshire* Acre, so that it must refer at least to something certain ; but this refers to nothing that is so ; but on the contrary, to a Thing that is a fluctuating Custom or Usage : 'Tis certain, that at the Time of an Old Lease, there was a Rent existing, and it was then known certainly what it was, and to make it good, it must now be also known what it is ; but may be it is unattainable by human Knowledge ; as to the Thing in Question, it is certainly absolute and general, but we mean useful Certainty, for the Benefit of Property ; and in that Respect, referring to Usage and Custom, is uncertain ; and therefore *Certum est quod Certum reddi potest* ; if fitted to maintain, that whatever is in itself once certain, must be ever certain, will not be granted ; for it may or may not be certain, according to future Events, and much less to bind a third Person ; and it is contradicted by *Owen* and *Aprée's* Case, *Cro. Car.* 95. Suppose it had been referring to a Lease or Leases between such a one and such a one, that also had been void between the Lessee and the Remainder Man, because the *Reversioner* might lose the Lease ; and so there is not an Equivalent to which he may at all resort to be ascertained, as in *Levison* and *Piggot's* Cases ; therefore 'tis not a good Reservation, where 'tis not certain in itself, but refers to ancient Usage and Custom. There is one uncertainty as to Nature, and another as to the Understanding. As for saying that a Verdict would have ascertained it, that would be aiding a legal Defect ; and to go before a Master or Jury to find what were the ancient Rents, is supplying a Defect which has been made in executing a Power against common Right : Here is really not an absolute, but a conditional Reservation, good indeed, between the Lessor and Lessee, but not to bind the Remainder Man ; the Condition is, *I let these Lands absolutely, and if an ancient Rent can be found, and you the Remainder Man can prove it, then I reserve it to you ; but if there be none, or if there be, and you can't prove it, you are to have none.*

There is another Uncertainty, which I don't need to rely on, and that is in the Thing demised, and that runs to *Aprée's* Case ; where Lands are demised by sufficient Description, the Lessee can't go back, unless he forfeits the Lease ; but here they are so demised, that tho' the ancient Rent had been reserved, yet the Tenant may say, they are either more or less ; but if they had been distinctly demised, and he should say so in Pleading, he would forfeit his Lease ; but here is no Light at all for the Lessor to go by, though he finds the certain Rent ; so that 'tis only a bare Possibility ; that by the Help of great Charges, and good Fortune and Industry, he may come at his Rent, if he can ascertain the very Lands anciently demised, and their respective Rents ; for if either the Lands or Rents be mistaken, he is still to seek. For if Lands

are leased for the Rent reserved anciently on those Lands, and there be more Lands in the Lease than anciently were let, that is not a good Lease; but if less or fewer Lands than anciently were let, be demised for the same Rent, it's certain that had been well.

In the next Place, if there had been a Recovery, and a Lease of divers Lands in the Recovery, that had been bad, and the same Uncertainty would hold; but the ancient Rent being a Sum of Money, you might reserve more than the ancient Rent; and so it appears, that tho' I had reserved by the Words *ancient and accustomable Rent*, that would be void; whereas, if I had reserved a Sum of Money, though it was no more than the ancient Rent, that had been good. So that *Certum est quod Certum Reddi potest*, will not do in this Case; besides, if you can maintain the Reservation on the Lease, yet the Lease is not in Severalty, as the Lands were formerly devised; And therefore 'twill be that Case cited in Point. Or if you should make it a Several Lease, yet there are more Lands; and then it will be a stronger Case against you, than if there had been less. But say you, 'tis the ancient Rent is reserved only, for the Lands anciently demised; that won't follow, for the same Lands are not demised in the same Several Lease. The Words are *Severally* and not *Jointly of all the Lands in the Settlement*, reciting the Messuages, Tenements and Hereditaments in several Manors, in the County of Chester, and all and singular the Lands comprised in the recited Power, *Habendum* for 99 Years, if Sir Charles Orby, &c. shall so long live, *yielding and paying therefore yearly the ancient and accustomable Rents usually reserved, and payable* (not said *heretofore*) in the leasing Part, only there is a severally (for the Lease is several and not joint) of all the Lands in the County of Chester, &c. and also of all the other Estate, &c. 'Tis indeed a Severance, but the minute'st that can be supposed. Suppose a Lease is of four Fields, and four Messuages severally, where usually only two Fields and two Messuages were let, that would not be good; for it ought to be a Severance of all the Things demised and take the Words to be such, that the Lands are usually perhaps let by Manors, &c. and the Reservation is severally, &c. but may have a Relation to the Usage or Custom, and in the demising Part, it is said anciently demised; so that the Construction that is endeavoured to be put upon it, would carry the Reservation to be several, farther than any Case yet has done: The Lands pass by this Deed, all during the Life of the Lessor; and therefore 'tis one Reservation singly of all the Rents, for all the Lands and Manors. *Thereof reserving several Rents*, will not be good for a Demise of them, where they are usually let single or together, and the calling them ancient respective accustomable Rents, is denoting what they were, not what Rents are reserved; and cited, *Dy. 309. a. Hob. 303.*

1 Moor 201. Moor 201. 'Tis true the several ancient Rents are reserved, but not for the several ancient Tenements, and *respectively* only denotes *but does not reserve* (or *refer*) therefore I am of Opinion, that the Demise, though several, and not joint, cannot be made any other Severalty than the old Demise, and that won't do the Plaintiff's Turn, for that will be for all the Lands; and that will be *Owen and Apree's Case*, and so let in a Manner never let before. Here are more Lands than anciently

were

were let; you won't say that the Rent was not as well reserved for the Lands not anciently demised as for those Lands that were; the Lease did pass as much; and as for the Reddities, 'tis, for all that was leased; and that Part that was not anciently demised being evicted, it must be apportioned; for there is no Covenant for the Lessee to pay the ancient Rent for the old Lands, in Case the rest should be evicted; therefore agreeable to common Right, against which the Power is made, and to what was then intended by the Settlement, the Lease not being severally, much less singly, 'tis void; for the general Course being in executing these Powers, to make the Deeds and Leases in particular Terms, and not according to the general Words of the Power; and now, since that, when these Powers have been perhaps, and I believe are much ancients than the Statutes for enabling Ecclesiastical Persons; this is the first Attempt that ever was made to delegate the Power generally (as I may say) that was to be executed particularly, in the same Manner as they were done before; and for that it would be fatal to all Remainder Men, because the Tenant for Life might on a sudden at any Time, make a Disposition of the whole Estate in this uncertain Manner; and being a new Invention in Derogation of Common Law, and tending to introduce Perjury, Forgery and Frauds, the Courts of Equity won't aid it by any Means; 'tis to be utterly exploded, like the Attempt of Justice *Richbell*, mentioned in *Littleton*; and therefore I am of Opinion, 'tis not a good Lease to bind the Remainder Man.

And the Lord Chancellor accordingly decreed, Sir *Henry Hobert* should be Trustee for the Uses in the Settlement, and permit his Name to be used, and decreed an Account of the mortgaged Estates; and if the Plaintiff sets up Title for the Inheritance and Mortgage, he must account for the whole Profits, as the Defendant's Council insisted on; but if the Account was any Way delayed, then a Receiver to be appointed. But he refused to speed the Account upon the Face of the Decree, because 'tis to be presumed, all Parties will obey. Then it was moved, that for the Sum of 8000 *l.* devised by the old Earl *Charles*, to the Lady *Gerrard*, and by her devised to young Earl *Charles*, who devised the same to the Defendant's Interest, might be discounted for the same by the Plaintiff, as Administrator to Earl *Fitton*, the Time Earl *Fitton* enjoyed the Estate; but to this, the Chancellor answered, that Earl *Charles* the younger having the Fee Simple in Reversion, and the Fee being now fallen into the Party who was to have that Money; Shall he not have it out of the Estate? For 'tis not Personally due on Earl *Fitton*; and it is too hard to give Interest for it to you that have the Fee, the same being a Personal Demand; 'twas urged, *Arwood* and *Thomas's* Case in the House of Lords, was the same, where she recovered her Portion after the Fee had fallen into her; but the Chancellor said, perhaps that was because of Fraud in the Trustees, and so would not decree any Interest for it, but that all Writings, except such as concerned the mortgaged Estate should be delivered up, and those also, when the Possession came to the Defendant, and decreed Costs for the 4000 *l.* only, as Mortgagees usually have in this Court.

Lechmere

Lechmere and others, against Blagrove and others.

1. l. Melan. v. R. v. A.

Where Lega-
cies devised,
shall be taken
in Satis-
faction of
Debts,
Marriage
Portions, &c.

A. agreed with *B.* to give the said *B.* 2000*l.* to be laid out by the said *A.* and this he gave as a Marriage Portion; the Marriage took Effect, and the said *A.* laid out the Sum of 1000*l.* in a Purchase, and afterwards mortgages those Lands, and then settles according to the Articles, only he failed in one of the Limitations directed by the Articles; *A.* after, made his Will, and devised those Lands to his Wife for Life, and also a Money Legacy, and gave Legacies to *B.* and his Children, and dy'd without Issue of his Body, leaving the Children of *B.* his Heirs at Law, who, together with *B.* brought their Bill against the Widow and Executor of *A.* to have an Account of the Profits, and for Performance of the Articles; the Chancellor said, that the Lands that were settled according to the Articles of Inter-Marriage, were a good Performance, so far as the Value was over and above the Mortgage; and 'twas insisted on by the Council, that the Legacy should go in Exoneration of the rest of the 1000*l.* which the mortgag'd Lands would not answer for, that if *A.* be indebted to *B.* and by his Will gives *B.* a Legacy, that Legacy, if Equivalent to the Debt, shall ever be taken to be in Satisfaction thereof; but it was urged on the other Side, that the Legacy so devised to the Children, was a Grandfathers Bounty, and could not be intended to go in Exoneration of the Heir's Demand, to whom the Estate was to come, especially, because at the Time of the Legacy, it was not known whether he would be Heir, or take any Thing by the Settlement; besides, it was given in Company with his Sisters, and the Controversy is now between the Executor of *A.* and the Plaintiff, and not between him and a Creditor: Also the Plaintiff and Defendant are Legatees in equal Degree, and there are Assets enough to answer all, and no Creditors in Danger. Yet the Lord Chancellor directed the Master to enquire what Assets by Descent in Fee, and other Personal Estate, came into his Hands, to be as Part of the Satisfaction of his Demand, and put the Case of *A.*'s receiving 1000*l.* to my Use, who dies and makes me Executor, that shall be a Satisfaction; and for these Reasons further, that he gave Legacies to all that could take by the Limitation agreed upon in the Articles; wherefore the Case is stronger than where it is given to one he owes it to; for 'tis harder to understand, as the Council for the Plaintiff argue, his Interest shall guide his Intent, which is a very fallacious Way; for he did not intend any Thing but to satisfy, and if not satisfied, then in strictness of Equity, he would have apply'd it so; and if you be satisfied, then you are mistaken as to the Intent, and so the Legacies must go in Satisfaction; and in Case, where one has a Debt due, either in Law or Equity, and the Debtor bequeaths him a Legacy, if other Creditors prefer their Bill against the Executors, to be paid their Debts, that such Legatee not having received his Legacy, must elect to come in as Creditor; for if he should be a meer Legatee, the Creditors must be first satisfied, and then, perhaps, there would not be sufficient left to pay him; whereas,

whereas, as if he was a Creditor, he was in equal Degree with other Creditors; and that if such Legatee prefers a Bill to be paid, 'tis the safest Way for him to sue as Creditor, and not as Legatee; and that when the Money is paid him, it shall go in Exoneration of both; and he said likewise, that where the Obligee is Heir to his Father, he shall have Satisfaction of the Executors, notwithstanding he has Assets by Descent, and that the Legatee in such Case, if he will receive any Benefit, where other Creditors are bringing in the Executors to Account to pay them, he must elect to come in as a Creditor, yet the Creditors by Consent, may admit him to come in as Legatee, to have an Account with them.

Davison *versus* Goddard & Ux' & al.

JOHN WALKER by his Will devised 10 *l. per Annum* to *A.* for Life, chargeable on several Houses whereof he was possessed, and made his Wife sole Executrix, and died; and she after made her Will, and *J. S.* Executor, and thereby also devised 10 *l.* for Life to *A.* and *J. S.* being afterwards seized in Fee of an Estate of Inheritance of his own, settled his Estate on himself for Life, Remainder to his 1st, 2d, &c. Sons in Tail, Remainder to Trustees for 99 Years, in Trust, to pay his Debts and Legacies, and afterwards that the said *A.* should have and receive the Sum of 20 *l.* a Year for Life, and gave other Annuities, and afterwards died without Issue, whereby the Term vested in the Trustees to execute the Trust; and the said *A.* preferred his Bill against the Trustees for Payment of the 20 *l.* devised to him by the several Wills, for that *J. S.* having wasted the Assets, 'twas a Debt due to him to which the Trust was subject, as also for the 20 *l.* Annuity: And the Question was, whether the said *A.* should have the 20 *l.* only, or 40 *l.* in regard that the several Annuities of 10 *l.* amounted to the Sum of 20 *l.* and the Estate on which the said several Annuities were charged coming to the said *J. S.* and he having out of his own Estate also granted an Annuity of 20 *l.* to the said *A.* for Life: Question, Whether that shall be construed in Satisfaction of the 20 *l.* he was obliged to pay pursuant to the several Wills. *Mr. Dolbin* and *Mr. How* argued, that they were several and distinct Annuities given and granted at several and distinct Times, and issuing out of several Estates, and that therefore it could never be construed that the 20 *l.* by the Settlement granted, should go in Satisfaction and Exoneration of the 20 *l.* Annuities that were bequeathed by several Wills. — *Mr. Vernon* argued to the contrary, that it could be but one 20 *l. per Ann.* and not two; and there are Incumbrances on his Estate, and he owes Debts, and therefore 'tis plain he intended the last 20 *l.* should go in Satisfaction of the first; and that is a common Case, where a Man is obliged to make a Payment, and he by Will or Deed gives any Thing to the same Person, it shall be intended *prima facie* for the Debt: The Cases of *Brice* and *Brice*, *Jusson* and *Jusson*, and *Keywick* and *Thomas* are in point. *Sir William Keywick* having two Estates in

The Testator charges his Estate with 10 *l. per Ann.* to *B.* *A.* the Devisee also charges it with 10 *l. per Ann.* after which, he in Remainder, charges it with 20 *l. per Ann.* Quere, if *A.* shall have 40 *l.* or only 20 *l. per Ann.*

several Counties subjects one at one Time for Payment of 5000*l.* and at another Time subjects the other Estate to the Payment of 5000*l.* but both were for Portions for younger Children, and altho' the Maintenance and other Terms in both Deeds were different and several; yet it was decreed here, and affirm'd in the House of Lords, that but one 5000 was charged on both the Estates. So *Jusson* upon Marriage, settled his Estate subject to the Portions of younger Children, and afterwards purchases another Estate, and subjects it to like Portions, and 'twas decreed to be only a double Security, not a double Charge. Mr. *How* distinguishes strangely, when he says it could not be intended, that 20*l.* should go in Satisfaction of 15*l.* because 'tis more. I think it were more strange that 15*l.* should go for 20*l.* because 'tis less; and yet even there, it would be no Obstruction, as it has been often ruled; so if I owe one 100*l.* and bequeath him 1000*l.* the 1000*l.* is given in Equity. It is said, that the 10*l.* devised by *Walker*, is not for separate Maintenance, nor is it material it should; let them agree that among themselves; for what comes in Lieu, will have the same Qualification; but it is material, that the Person employed to draw the Deed, had Instructions to swear what he was obliged; and he swears this was intended a Satisfaction for the Annuities; 'tis also considerable, that if all the Debts were paid, and also those Demands, there would be nothing left; now 'tis not to be presumed he would give 20*l.* Annuity over and above the former, and leave the Heir a starving; and so another Witness swears, that he intended the 20*l.* should go in full of all Demands; besides, at the Time of the Settlement, though he knew all this, he directed 20*l.* and 20*l.* Annuities, which might possibly fall upon his Estate; but it was impossible they should take Place if this Construction of both 20 Pounds was to hold. Lord Chancellor agreed the Gifts by the Will good, and that where a Man is Debtor in 10*l.* gives 20*l.* that it shall be a Satisfaction, not a Legacy, and that he believed in his own private Opinion, that 20*l.* Annuity was intended for Satisfaction, and that as Mr. *Dolbin* said, there was no Case like this in Point; yet 'twas agreed the Costs should be decreed against *A.* the Plaintiff, because he knew in his Conscience that *J. S.* intended Satisfaction. 'Twas also agreed in this Case, that the Defendants might read their own Answer by the Draught, but if it had not been their Answers, it must be by Office Copy, &c. that what an Infant receives in Right of her Mother, of the Estate, must be subject to his Annuity; for the Parol shall not demur in Prior Incumbrances, nor in Trusts for Sales, but in Equities of Redemption only; and the Court decreed the 10*l.* first devised, must be paid Prior to the other 10*l.* by the Executor, and if *A.* will take the 20*l.* Annuity by the Settlement, he may subject himself to all Incumbrances; but the Incumbrances prior in point of Time to be preferred, and the other Incumbrances had Notice of the Deed to be posterior to their Incumbrances; and therefore the Incumbrance by Judgment being a Lien on the Land, prior to the Grant of the Annuity, shall be preferred before the Grant of the Annuity, because his Charge on the Land is posterior.

Sir

Sir George Hungerford, against Walter Hungerford.

Edward Hungerford, 18 May, 1663, devised his Manor of *Chilton*, to *William Battyman* and *Walter Hungerford* in Trust, to sell after his Decease, and to pay the Money to his Executors, who was to divide the Purchase Money in four Parts, the first Part thereof to come and be payable to his second Son *Robert*, and three Parts to his youngest Son *John*, and his Tenements in the County of *Wilts.* to be sold by them, and the Money to be paid to his Executrix, to be recommended to her as a Legacy to *Robert* and *John's* Use, and if one of them die, the Legacy to be void, and made his Wife sole Executrix and died: *John* survived a Year, but no Sale was made in that Time, and afterwards died the 13th of *October*, 1668. The Act of Distribution was made afterwards in the Year 1670; the Mother, the Executrix, never administered to the said *John*, but after her Death, the Administration generally (not *de Bonis non*, &c.) was granted to the Defendant, who was the eldest Son, by the Settlement or Will, the Residue of the Estate of his Father, was limited to Sir *George* the Plaintiff for Life, *sans Waste*, with Power to make Leases for three Lives; Remainder to *A.* for three Lives; Remainder for Life to his Son *George*; Remainder to the first, and every other Son of *George* the younger, in Tail Male; Remainder over. Young *George*, at the Instance of his Father, agreed to suffer a common Recovery, and charge the Estate with 4000*l.* Mortgage; 1500*l.* to one *Robert Stanley*, and 2500*l.* to one *Thomas Edwards*, and in Consideration of his joyning the said *George*, parted with all his Powers, and in Lieu, had given him a Cottage called *Coltmans*, in Fee worth 28*l. per Ann.* and *George* the younger dying, the Estate came to his Brother *Walter* the Defendant in Remainder, with whom, Sir *George* the Father coming to an Agreement, about paying the Interest of the Mortgage, he accepted of a Letter of Attorney, to have, take and receive the Rents of the whole Estate, and to see and pay off the Interest of the Mortgage, 1673. The Mother, the Executrix of *Edward*, by the Name of the late Wife, and Relict of *Edward*, (tho' Administration was never granted to her for *John*) and the Trustees, joyn'd and sold all the Legacy Estate to *Robert*, the Son and Legatee of *Edward*, and he devised to one *Hungerford* and *Smith*, to the Use of young *George Hungerford*, and his Heirs for ever; by which Means *Coltmans* came as before, to the Plaintiff and his Heirs, by the Disposition of the said *George*; and the rest of the Estate came to the Defendant by Descent, who having Occasion for Money, sold *Chilton* for 1500*l.* having first got about 500*l.* Fine for a Lease, and gave a 2000*l.* Bond, to make a Conveyance thereof, to which the Father should be Party, who claimed a Title thereto as Administrator to *John*, to have the same sold, and three Parts of the Money arising by the Sale; the Plaintiff refused to join, unless he had half the Purchase Money; the Defendant offered him 300*l.* at length, in Consideration (as it was alleged) that he would let the Defendant come into present Possession of

Devise of
Lands in
Trust to
sell, &c.

100 Years of the Estate, it was agreed that the Plaintiff should have 1000 l. of which 600 l. was at several Times paid to clear his Debts, and there is a Deed not witnessed nor endorsed, but sealed and delivered by Sir George, dated 18 Feb. 1700, for 222 l. and 99 l. acknowledged to be received by Sir George; and also a Bond of 95 l. from young George, to one Owen a Taylor, who had sued Sir George for 122 l. for Work done, of which 20 l. was for himself, and 102 l. for young George; and Sir George upon Payment of the Debt, took it up and cancell'd it; but one Butler, who was George's Executor, was not before the Court. 'Twas agreed in the first Place, that Sir George was entitled to the Legacy of John, as his Administrator, or to three Fourths of his Estate to be sold as Brother and Heir, because the Words *became due and payable*, referred only to the Time of Sale, and he died before his Interest vested, and so it must descend, or else the Words are unnecessary, especially in this Case, when he left neither Wife nor Child, on the Reason of Sir Thomas Doleman's Case. But the Chancellor told the Solicitor General, that John had survived Edward the Devisor, and if he had survived the Sale, and left Wife or Child, it would vest; and so if he left any Representative, the same would vest also in such Representative, and that tho' no Time is limited for the Sale, yet a reasonable Time was intended, and the Administrator had a Right to joyn in the Sale as the Mother did, though without Administration for the distributive Right vested, if any Body dies; and he, who has such a Right, it shall go to his Executor or Administrator; and agreed, she had the Possession as Executrix to her Husband, and the equitable Right as Administrator to her Son; but Mr. Solicitor deny'd that she could have any distributive Right, being before the Act of Distribution, or any Interest in her, and so it must result to Sir George.

Another Question arose about the Sale, whether good or not, when the Executor and Trustees had joyn'd to sell, for the Trustees by the Deed may sell, and pay the Money to the Executrix. But the Chancellor said, by their having Notice of the Trust, they should sell it, seemed that all Parties in Interest had joyn'd, but did not give any Opinion in it. The next Question was, whether the thousand Pound was for joyning in a Deed for the Sale of Chilton, or for the Annuity also; and the Chancellor said, that though in his own private Opinion, he thought the Annuity was agreed to, yet it being in Proof and a colourable Title in Sir George, as Administrator to John, and that 100 l. being offered, and half of the Purchase being treated for, he allowed the 600 l. already paid, and all the Securities to be delivered up that were paid off by the Defendant.

3 Another Question was about the 4000 l. if Sir George must pay any Part of the Principal, or only keep down the Interest; and after a long Argument, and many Diversities taken by Sir Thomas Powys, 'twas agreed, as where a Devise is of an Estate incumbered, and where a Tenant for Life prevailed on the Remainder Man, to be security in joyning, to subject the Estate; and my Lord Chancellor took Occasion to mention the said *Huntingdon's Case*, who having prevailed on his Wife to joyn in charging her Estate, he afterwards paid off the Incumbrances,

Incumbrances, and would have continued the same thereon, and had the Decree of this Court for that End against all Equity; but that Decree was reversed in the House of Lords: For if a Man mortgages Lands for my Debts, and I afterwards pay the Debts and get an Assignment of the Mortgage, yet the Land is discharged: Now the Case here differs, for it secunds in Contract the parting with the Power, and vesting the Fee in *George*, who could only by a common Recovery create a *conditional Fee*, viz. by barring of his Issue, have only an Estate to him and his Heirs whilst he had Heirs of his Body, and by this joining of *Sir George* he had the whole Fee; and because of these Considerations young *George* could not compel his Father to pay the Principal, but only keep down the Interest, much less the Defendant, who had accepted the *Letter of Attorney*, by which *Sir George* was bound only to pay the Interest, no Possession being thereby given to the Defendant but a bare Power to receive, upon which he could not have even any Salary for his Trouble, which though revokable at Common Law, yet it is a good Evidence and Contract in Equity, and shall debar the Defendant for demanding more by his Acceptance; and agreed that a Remainder Man can only force the Tenant for Life to keep the Interest down if the Land be charged, that he can't compel him to redeem directly, tho' indirectly he may by purchasing in the Mortgage, then to pay but One Third, or Part with the Possession; and *Sir Thomas Powis* insisting that the Money was borrowed by the Plaintiff, he ought to discharge it, and the Defendant had the same Remedy in Equity as in a Personal Security. The *Chancellor* took a Difference, that where a Person was Security in a Contract, there is a joint Contract that the Principal shall indemnify the Security, and that the Ground of Equity is, that when the Money is due, the Equity arises; but *Sir Thomas Powis* said that one may exhibit his Bill before the Time of Payment; but where the Land, or the Land and Person are both Security, the Estate stands at Stake to enable the Principal to owe it as well as the Security to pay it or borrow it thereon; and the Contract of the Security is, that he shall continue to owe it on the Credit thereof, and not to go to Gaol the next Day, for even in a Personal Security you must the next Day apply for a Reimbursement, for what was Equity one Day was Equity the next; but here are the Conditions fallen in, which note a Difference, though it is a Damage after the Contract, and ought to be indemnified if it stood singly on the Bond, yet the minutest Consideration would alter the Case. *Master of the Rolls* demanded, whether they both covenanted to pay the Money as well as give the Bonds, and was answered, they did by the Deed; then suppose *Sir George* had died, and his Son *George* survived, could he prefer his Bill against the Executors of *Sir George*? *Chancellor*, If he had paid and took up the Bond or paid, and had the Covenant assigned, he might, not else. It happened on the Deed 10 Feb. 1700, the Defendant had an Order to prove the Deed, by Virtue of which, he would have proved the Death of one of the Witnesses, but it was deny'd, and so that Part of the Demand fell, and also that of *Owen the Taylor*, as well for want of Parties, as for

T

a Point

a Point more disclosed by him in his Depositions, that he was originally employed by Sir George, to work for his Son, and though then of Age, the Chancellor agreed, if there had been Parties, the Bond signify'd nothing; and as to the rest, he decreed first, an Account of the Profits of the Trust Estate, devised to Sir George, paying and restraining, and then to be assigned to the Trustees *Hungerford* and *Smith* the Surplus, a Moiety to go to the Plaintiff, and a Moiety to *Francis*, and reserves Costs. Secondly, as to the Coal Mines only decreed to the Plaintiff, but the other Part of *Robert's* Estate to the Defendant, who claims the Equity of Redemption of that, and the rest of the Estate in Mortgage, after the Plaintiff's Death; in the mean Time, the Defendant to have and receive the Rents, paying the Interest of the Mortgage to the Mortgagee, and the Overplus to his Father, but not to meddle with the Possession in Sir George; and that he paying the Interest duly, may receive the Rents himself; but the Defendant must see and have the doing of it, and it can't be put into other Hands; for though revocable at Law, yet in Equity Sir George must be holden to this Letter of Attorney, and no Allowance is to be for the Defendant's Trouble in receiving; because 'tis his own voluntary Act. Thirdly, As to *Chilton*, the Devise is of all the Lands in *Bucks*, and he had no other Lands there; and though a full Consideration was paid for it over and above his own third Part, yet Sir George having a Colour of Title, which by his setting up, frightened the Purchaser, the Defendant offering Money, and 6 or 700 *l.* since actually paid, the Deed executed by him who had Colour, who insisted on it, and who was offered and treated with, joined, and Money paid pursuant to all this, appearing judicially before me, and no Proof of the Annuity or the 1000 *l.* though in my own private Opinion, I am satisfied, because of the Smallness of the Purchase, and other Circumstances of the Case, that it was as the Defendant says; yet no Proof appearing, the Plaintiff must take all that he has already got towards the 1000 *l.* but no more; and the Defendant must give him all the Securities, for which he paid any Part of the Money for the Plaintiff, and therefore Costs. Note, in this Case, publick Evidence prevailed against private Judgment, which is rare in a Chancellor.

Note.

Meredith *versus* Wynne.

Where a Marriage Portion unpaid, shall go to the Husband or Wife's Administrator.

IN this Case, the Question was, whether a Wife's Portion of 1250 *l.* charged by Will on such Lands, pursuant to a Power in a Settlement, should go to the Administrator of the Wife as a Chose in Action, or to the Plaintiff who was Administrator to the Husband, they both being dead, and the Money not yet received; as to which, the Case was, in short, that one *Wynne*, on the Marriage of his Son *William*, settles several Lands on that Marriage, with a Power for *John* by Writing, to charge the Lands with 2000 *l.* for such Uses as he should think fit; and after *John*, by Will reciting that Power, charges the said Lands with 2000 *l.* for his two Daughters *Donatby* and *Barbara*, and directs that his Son *William* should within two Months after

after his Death, give them Security for 1000*l.* apiece, being the 2000*l.* he had a Power to charge, and if he should refuse so to do, then he made *Dorothy* and *Barbara* Co-Executors with *William*, and likewise gave to his said two Daughters 250*l.* apiece, besides the said 2000*l.* and dies; *William* gives his Sisters Bonds for their Fortunes; *Barbara* intermarries with one *Richard Middleton*, and on the Marriage Treaty, Articles were entered into, whereby *Richard* agreed to clear his Estate, being 700*l.* per Ann. of the Incumbrances that were then upon it, within six Months after the Marriage should be had, and for every 100*l.* he received of *Barbara's* Fortune, to settle 10*l.* per Ann. on her, for her Jointure for Life, and to settle Lands on the first, and other Sons of that Marriage; *Barbara* was not party, at least never sealed these Articles; the Marriage took Effect; *Barbara* dies within the six Months, without Issue: *Richard* on a second Marriage with one *Dorothy Pledell*, who had a Portion of 1600*l.* in Trustees Hands, by Articles, agrees to lay out the 1250*l.* he was entitled to, in Right of his first Wife, and this 1600*l.* when received, in the Purchase of Lands, to be settled on *Dorothy* for a Jointure, and Provision for the Issue of that Marriage; which Marriage afterwards, also takes Effect; then *Richard* dies before he got in either of the Portions. The Plaintiff his Sister, takes out Administration to him, and intermarries with the Plaintiff *Meredith*; they come to an Agreement with *Dorothy*, whereupon she was to retain her 1600*l.* and to release her Title to the 1250*l.* or to any Settlement to be made on her therewith; and this is reduced into Writing and executed: The Defendant took out Administration to *Barbara*; and against him and *John* the Grandson and Heir of old *John Wynne*, who had the Lands by Descent, subject to raise this 1250*l.* was this Bill brought to have the Portion raised; and accordingly my Lord Keeper decreed it, because the Husband was a Purchaser of the Wife's Portion, by his Agreement to disencumber his Estate, and settle a Jointure on her, wherein he had proceeded so far, as to sell some of his Estate, to discharge the rest; and the Death of the Wife without Issue, prevented his making a Settlement pursuant to the Articles; so that having done all in his Power, and being guilty of no Default, he ought not to suffer by the Death of his Wife, which was the Act of God; and the Plaintiff having now taken out Administration to him, stands in his Place, and must have the Benefit thereof; besides, upon his second Marriage with *Dorothy Pledell*, he actually agreed in Consideration of her Portion, to lay out this 1250*l.* and settle the Lands on her, so that she became entitled to this Money as a Purchaser for valuable Consideration, and then she, after her Husband's Death, chose to have her own 1600*l.* which belonged to the Plaintiff as Administratrix to the Husband, and the Plaintiff agreed to it, by which the Plaintiff likewise became a Purchaser for the 1600*l.* they covenanted to give up to the Widow, and therefore decreed an Account to be taken of the Personal Estate of *John* the Grandfather, and because that fell short, it was to be made up out of the Real Estate come to the Defendant's Hands, and if any real Charges were paid out of the Personal Estate, the Plaintiffs to stand in their Place for a Satisfaction of the 1250*l.* out of the Lands, to make up

up so much as the Personal Estate remaining should fall short to pay. *Note*, a Case was cited of *Burnet and Kinaston*, where a voluntary Disposition by the Husband, of the Wife's Portion before it was got in, being secured by mortgaged Lands, and decreed it should not bind the Wife or her Representatives after his Death; but here the Husband was a Purchaser for a valuable Consideration. Another Point in this Case was, that Serjeant *Owen Wynne* had by his Will devised to *Barbara* 100*l.* Legacy, and another Person had likewise by his Will given her another Legacy of 50*l.* and of both these Wills, *John* the Father of *Barbara* was Executor, and whether the 1250*l.* given by the Father, should go in Satisfaction of these two Legacies of 150*l.* was a Question; but 'twas argued by Mr. *Vernon*, (and not much opposed by the other Side) that this could not be taken to be in Recompence or Satisfaction of these two Legacies, because there was no Legacy given particularly to *Barbara*, but the 250*l.* apiece, as well as the 2000*l.* he had a Power of charging, was given equally to his Daughters; and if this should be a Satisfaction to *Barbara's* two Legacies, she would not have an equal Share with her Sister, of her Father's Bounty; and his giving the 1250*l.* to his Daughters, equally shews he intended to put no Difference between them, as to any Provision arising from himself.

Hall versus Brooker.

Tuesday the
30th of Octo-
ber, 1711.
J.G. in Court.
Personal
Estate where
to be applied
in Case of the
Real and
e contra.

IN this Case 'twas agreed by the Council at the Bar, and not denied by the Court, that if a Man devises particular Lands to be sold for raising Money for Payment of his Debts, and then gives several specifick Legacies out of his Personal Estate, and afterwards in the Conclusion of his Will, *all the rest and Residue of my Personal Estate whatsoever I give and devise to my Wife* (or any Stranger) *whom I hereby make Executor*; that in this Case the Personal Estate shall be first applied towards the Payment of Debts in Exoneration of the Real Estate so devised to be sold, for the Benefit of the Heir at Law, and that the Real Estate shall only come in Aid of what the Personal Estate falls short to pay, because the Devise to the Executor was perfectly superfluous and idle, and no more than what the Law would have said if there had been no such express Devise, and therefore the Executor must take such Residue in the same Manner, and under such Charge as he would have done had it been left generally to fall upon him as Executor, which must be after Payment of Debts and Legacies thereout, as the proper and natural Fund for that Purpose, and to the Payment whereof his Office, as Executor, obliged him; but if the Devise of all the rest and Residue of his Personal Estate had been to *J. S.* and he had made his Wife, or any other, Executor, there *J. S.* the Residuary Legatee, should have the Residue and Surplus so devised to him, exonerated and discharged of the Debts; and in such Case the Real Estate, which was expressly devised to be sold, should in the first Place be wholly applied to that Purpose, and the Personal Estate should only come in Aid of the

Real

Real so devised, to be sold to make up what fell short to pay off the Debts: 'Twas likewise agreed, that if any particular Part of the Personal Estate, as a House, or 500 l. in Money, were devised to any one whom he also made Executor, that in such Case the Executor should not be chargeable in respect of that particular Legacy to the Payment of the Debts; that the Real Estate should in the first Place be sold for the Payment thereof, and in Case that fell short, the Executor should be chargeable only in respect of the Residue and Surplus of the Personal Estate cast upon him by the Law, and not in respect of such particular Legacy. And Mr. Vernon said, there had been Cases decreed in this Court, that where a Legatee had been forced to abate of his Personal Legacy towards Payment of Debts, that in such Case he had been let in to stand in the Place of a Creditor to recover his proportionable Satisfaction out of the Real Estate devised to be sold for Payment of Debts: And in the principal Case the Question arose upon the Will of the late Lord Chief Justice Hales, who had by his Will devised particular Lands to his Wife during her Life, with Power for her by letting of Leases to raise Money for the Payment of his Debts; and after having given away his Study of Books to such of his Grandchildren as should study the Law, and his Mathematical Instruments to his Wife, he devises the rest and Residue of his Personal Estate to his Wife; and then goes on and gives several Directions touching other Things, and in the Close of his Will says, *I do hereby make and ordain my said Wife sole Executrix of this my last Will and Testament*; so that it was a kind of a middle Case, and whether the express Devise to the Wife of all the rest and Residue of his Personal Estate in one Part of the Will should be so coupled with the last Clause, whereby he made her Executrix, as to be all one with the first Distinction, where a Man devises all the rest and Residue of his Personal Estate to his Wife, or any other, whom I hereby make Executor; or whether this Devise of the rest and Residue of his Personal Estate, being a distinct and independent Clause, should be look'd upon as a specifick Legacy to her, and to exempt such Residue from being applied in the first Place towards Payment of the Debts, in Ease and Exoneration of the Real Estate expressly devised for that Purpose, as it would have been if another Person had been made Executor, was the Question: Mr. Vernon insisted that it should be exempted, that here he gave her the Residue of his Estate as a Legacy, before he seemed to consider who should be his Executors, that the making the Executrix was in a distinct Clause after, and had no relation to the Devise in his Will to her before: But my Lord Keeper seemed to incline it would be all one, but said it was a Case which often might have happen'd, and therefore he would see Precedents; and his Lordship and all the Bar agreed that the Cases wherein the Personal Estate has ever been applied in Ease and Exoneration of the Real Estate, are only where there was no express Exemption of the Personal Estate; for if the Devise here was of such Lands to be sold for the Payment of Debts and Legacies, and *I will that my Personal Estate shall not stand to be charged, or liable thereto*; or if the Devise for

Legacy to an
Executor.

Sale of Lands for the Payment of Debts had been general, and he had after devised all the rest and Residue of his Personal Estate, *having already made Provision for the Payment of my Debts and Legacies out of my Real Estate, or out of such particular Lands, &c. or such like Clauses*; in those Cases the Real Estate so subjected should not be exonerated by the Personal, and cited the Case of the Lady Gainsborough and of one *Taribay*, and several other Cases.

Hyde *versus* Hyde.

Age of de-
viling and
consenting.

IN this Case no Dispute was made, but that a Male Infant of fourteen Years of Age, and a Female of 12 Years of Age, might make a Will of a Personal Estate: And Mr. *Gilbert* said it was so agreed by my Lord Keeper *Wright* in the Case of *Sharp and Sharp*, wherein they follow'd the Rule of the Civil Law of *Justinian* for their Consent to Marriages at such Ages,

Jones *versus* Westcomb.

A Term de-
vised to a
Wife, Execu-
trix, and a
Child *ensient*,
&c. The
Surplus to
be distri-
buted.

THIS was a Case wherein my Lord Keeper took Time to consider, before he would give his Judgment, and was thus: A Man possessed of a long Term of Years, devised it to his Wife for Life, and after her Death, to the Child she was then *ensient* of, and if such Child died before it came to the Age of 21, then he devised one Third Part of the said Term to his Wife, her Executors and Administrators, and the other two Thirds to other Persons, and made his Wife Executrix of his Will and dy'd; and this Bill was brought against her by the next of Kin to the Testator, to have an Account and Distribution of the Surplus of the Personal Estate not devised by his Will; and two Questions were made, first, whether this Devise to the Wife of one Third Part of the Term was good, because it happened she was not then *ensient* at all, and so the Contingency upon which the Devise to her was to take Place, never happened. The other Question was, whether this Term being Part of the Personal Estate, (it being expressly devised to her for Life, with such other contingent Interest on the Death of the supposed *ensient* Child before 21) should exclude her from the Surplus of the Personal Estate, which belonged to her as Executrix, and so the Surplus go in Course of Administration, to be distributed amongst the Plaintiffs, as next of Kin. As to the first, my Lord Keeper delivered his Opinion, that tho' the Wife was not *ensient* at the Time of the Will, yet the Devise to her of such Third Part was good, and as to the other Point, dismiss'd the Plaintiff's Bill, and so let in the Executors to the Surplus of the Personal Estate, notwithstanding the Devise to her of Part as aforesaid, and one *Littlebury's* Case was mentioned, where a Man made his Will, and gave a Stranger a Legacy, and made him Executor; and upon Suit in the Mayor's Court of *London*, for a Distribution of the Surplus, Sir *Peter King* declared it accordingly; but on Appeal to the House of Peers

Peers, that Decree was reversed ; so that now the Resolutions seem to be against *Foster* and *Mount*'s Case, though I've heard say in that Case, *Foster* and *Mount*. there was Practice in the Executor, for which he was punished with *Vide Post*. the Loss of the Surplus of the Personal Estate.

Nicholas Brown and Pittman.

THIS Case arose upon the Will of one Mr. *Larder*; who being possessed of a Personal Estate to the Value of about 500 l. consisting chiefly of Money out upon Sureties, did by his Will in 1685, devise all his Personal Estate whatsoever, to one *John Holland* for Life, and afterwards to all such Issue as he should have jointly, and for want of such Issue, to *Nicholas Down*, and to his Issue, and made three Executors and dy'd. The surviving Executor made the Defendant and two others his Executors, in Trust for his Children and dy'd. The Defendant only proved the Will of the surviving Executor, and acted in the Trust ; and now against him, this Bill was brought by *Nicholas Brown*, as Administrator to *John Holland*, who died *intestate*, and without Issue, to have an Account of the Personal Estate of *Larder*, the first Testator, as belonging to him by Virtue of the Devise to *John Holland*, which vested the whole Interest and Property thereof in him, and consequently the Devise over on Condition carry'd nothing ; but before the Cause came to a Hearing, the Plaintiff bethought himself, and for Fear that Title should not hold, brought a Supplemental Bill, wherein he suggested, that himself was the Person intended by the Testator's Will, to have the Devise over, and that the calling him *Nicholas Down* was a Mistake ; and therefore if his Bill, as Administrator to *John Holland*, should not prevail, then he ought to have an Account as Devisee in Remainder ; and now the Cause was brought on to a Hearing on Bill and Answer, only that Mr. *Vernon* objected, that though the Plaintiff had in his Bill called himself Administrator of *Holland*, yet he having not reply'd, no Examination could be to his Administration, or whether he were Administrator or not, and without that, he could make no Title. Another Objection he made was, that the Plaintiff not made proper Parties to his Bill ; for it appeared by the Defendant's Answer, that there were four other Persons named Executors with him, and therefore they ought to have been made Parties, for they might have Debts out of the Estate, or other Allowances to be made them : But 'twas answered as to the first, that the Plaintiff had in his Bill set forth, that Letters of Administration were granted to him, as by the said Letters of Administration ready to produce might appear ; and this was not deny'd by the Defendant's Answer, and therefore they might render them in Court. As to the second Objection, 'twas answered, that the Defendant had by his Answer confess'd, that he alone proved the Will, and acted in the Executorship, and that the others never intermeddled therein ; and that in such Case, in an Action at Law, it would have been sufficient to have named him only, who proved the Will much more in a Court of Equity. And my Lord Keeper was of the contrary.

Devise of
Personal
Estate in
Trust, in
Remainder,
&c.

Supplemen-
tal Bill.

Vide 9.
Co. 36. b.
Henslow's
Case. All
the contrary.

the same Opinion, as to both Points, and said, if the other Executors had any Demands out of the Estate, they might be at Liberty to come in before a Master, if they thought fit to make them out: Then as to the main Point, whether the Devise over was good, the Council for the Plaintiff took it so clearly void, that they offered no Argument in Support of it; and the Council for the Defendant not much opposing it, (as being a kind of an Entail of a Personal Estate to *John Holland*, and therefore vested the whole Interest in him, and so belonged to the Plaintiff as his Administrator) therefore the Plaintiff had a Decree for an Account upon his Original Bill, and his Supplemental Bill, which was founded on the other supposed Title, was dismissed. Mr. *Vernon* said, this *Devise over* not being confined to *Holland's* dying without Issue, in the Life of any Person in Being, could not be supported, and therefore offered nothing in Defence of it.

Stapleton versus Cheales.

A Legacy devised payable at 21, is *Debita in presenti*.

Where 'tis a lapsed Legacy.

Note.

IN this Case, it was argued by Council at the Bar, and agreed by the Court, that if a Legacy be devised to one, generally to be paid, or payable at the Age of 21 Years, or any other Age, and the Legatee dye before that Age, that his Executors or Administrators may sue for it, and recover it; and with this agrees the Law of the Ecclesiastical Court, as was agreed by Doctor *Aubrey*, 1 *Leon.* 177. Lady *Lodge's* Case; for this is *Debitum in presenti*, though *solvendum in futuro*; but if a Legacy be devised to one at 21, &c. or if, or when he shall attain that Age, and the Legatee dye before, in this Case the Legacy is lapsed, and shall not go to his Executor or Administrator; but if in that Case the Testator had added, that in the mean Time, or 'till the the Legatee attains that Age, he shall have Interest for that Legacy at such a Rate, from the Testator's Decease; this Clause subsequent, explains the Intent of the Testator, so as to make the Legacy, which was the Principal, vest such an Interest in him, as should go to his Executors or Administrators, though the Legatee die before that Age, because, if the Principal were not due presently upon the Testator's Decease, there could no Interest accrue to the Legatee at that Time; and this has been settled in *Cloberry's* Case, 2 *Vent.* 342. and in *Pates* and *Falley's* Case, and several other Cases in this Court; but if such Portion were to arise out of Lands, or out of a Term for Years, though it were limited to the Party, generally to be paid, or payable at such an Age, and the Party dy'd before that Age, there, for the Benefit of the Heir, the Portion should sink, and not go to the Representatives of the Party so dying; and the Master of the Rolls said, the Provision for Payment of the Interest, in the mean Time, where the Legacy was given generally, and at, or if, or when the Party should attain such Age, that that should make it an Interest vested presently, was an Alteration of the Law, from what it was held in *Co. Lit.* 299. b. When he read that Book, which was about 50 Years ago, though the Reason of

of the Law, as then taken was, because there was no such Additional Clause to explain it.

Mason *versus* Day.

ELIZABETH Mason having purchased a Lease to her and her Heirs, during three Lives, from the Archbishop of *Canterbury*, dy'd, leaving *Mary* her Daughter and Heir an Infant; two of the Lives being dead, the Guardian of the Infant, out of the Profits of the Estate, took a new Lease from the Archbishop to the Infant and her Heirs, during three other Lives, *i. e.* during the Life of *Cestuy que vie*, and two others; then the Infant dies without Issue, and the Question was, whether this should go to the Heirs of the Part of the Father, or to the Heirs on the Part of the Mother; 'twas agreed it should go to the Heirs on the Part of the Mother, it being only a Renewal of the old Lease, and under the old Trust, and if the Infant Heir had dy'd without Issue before the Renewal, leaving the surviving *Cestuy que vie*, there had been no Question of it, and so ought this new Lease, being renew'd out of the Profits of the old Lease; but 'twas answered, and resolved by the Master of the Rolls, that this new Lease was a new Acquisition, and vested in the Daughter as a Purchaser, and therefore should go to the Heirs of the Part of the Father, the Renewal by the Archbishop being gracious and spontaneous; and he differenced the Case from a Copyhold, for there the Lord is only Trustee for the Heir, and is bound to admit him; and though the Lord be the Original Grantor, yet it is only in Virtue of the Trust reposed in him by Law for that Purpose, and 'twas decreed accordingly; and my Lord Keeper coming into Court, and being asked his Opinion in it, said, he was of the same Opinion to prevent a Rehearing.

A renewed Title, descends not to the Heirs of the ancient Right.

Greenhill *versus* Greenhill.

THIS Cause came on upon an Appeal, from a Decree made by Lord Chancellor *Cowper*, and the Case upon Opening appeared to be thus; one Mr. *Greenhill* desired Mr. *Young* to purchase an Estate for him, of about 10 or 12000*l.* Value in such a Place, and Mr. *Young* meeting with an Estate which he thought would answer Expectation, agreed for the Purchase of it; and thereupon by Articles dated 10th of *April*, 1706, between the Vendors and their Wives on the one Part, and *Young* of the other, the Vendors agree to deliver Possession at *Michaelmas* following, and to execute sufficient Conveyances thereof; and *Young* covenants to pay the Purchase Money at *Michaelmas*, when Possession was delivered. In *June* after, Mr. *Greenhill*, for whom the Estate was purchased, makes his Will, and thereby devises all his Personal Estate to be sold, and the Money to be laid out in the Purchase of Lands, to be settled together with his Freehold Estate on the Plaintiff; and in another Part of the Will, devises all his Lands of

2 Vern. 679.
Eq. Abr. 174. *per* Doc. in
Devise of all
his Estate;
passes an
Estate agreed
for by Ar-
ticles only.

Inheritance to the Plaintiffs and their Heirs at *Michaelmas* following: Possession was accordingly deliver'd to *Young*, and this Money paid, but Conveyances were not executed 'till about a Year after; then *Greenbill* dies without new Publication of his Will, and the Plaintiffs brought their Bill against *Young* and the Heir at Law to have Conveyances executed to them, pursuant to the Devise: Part of the Estate so devised was customary, and lay in *Cornwall*, and by the Custom there, a Surrender to the Use of his Will was necessary to pass such Lands, tho' otherwise they passed by Lease and Release, as Lands at Common Law, and so were not Copyhold: The Defendant *Young*, by his Answer, confessed the Trust; and the Question upon this Case was, whether the Will was sufficient to pass the Trust of these Lands, and Chancellor *Cooper* decreed it was: Now it was argued by Sir *Joseph Jekyll* and Mr. *How*, that that Decree ought to be revers'd; they both took a Distinction between an Agreement for the immediate Purchase of Lands of such a Value, and an Agreement for the future Purchase of Lands, &c. as that was, they agreed that if the Articles had been for the present Purchase of these Lands, then the Vendor had been a Trustee presently for the Purchaser, and then such Devise of them had been good in Equity: But here the Possession was not to be deliver'd 'till *Michaelmas* following, nor was any Money to be paid before that Time, and then the Purchaser had not Power to devise them sooner, no more than a Devise of Lands, which one should after Purchase, would be good, as has been settled in the Case of *Brunker* and *Cook*, which was adjudged in both *B. R.* and *C. B.* and afterwards affirmed an Error in the House of Lords. So if a Man had a Judgment or Statute against another, though that bound Lands of Freehold or Inheritance, from the Time of the Judgment given, or the Statute acknowledged, so that the Conusee has not so much Interest as he can devise, even before Execution actually taken out; yet 'tis otherwise of Copyhold and Customary Lands.

'Twas likewise urged that these customary Lands cou'd not pass by the Will for want of a Surrender previous thereto.

'Twas likewise argued on the other Side by *Vernon* in Support of the Decree, that these Lands were bound immediately from the Execution of the Articles; that the Possession not being to be deliver'd 'till a future Time made no Difference in Equity; that if Mr. *Greenbill* had died before *Michaelmas*, the Equity would have descended to his Heir, and that Heir might have brought a Bill against Mr. *Greenbill*'s Executors to compel the Payment of the Purchase Money out of the Personal Estate; that in that Case the Money was bound by the Covenant; and if the Plaintiffs should not have these Lands they would lose both Money and Lands too; for if the Money had been at Liberty, that would have passed by the Will to the Plaintiffs; but now that being bound by the Covenant, if they can't have the Lands they must lose both; that the Case here was different from the Case of *Brunker* and *Cooke*; because here the Lands were immediately bound by the Articles, and were in Equity as much the Testator's as if he had been immediately let into Possession; and as to the customary Lands no Surrender was necessary; for even in Case of Copyhold, tho' to pass the

the Lands themselves, a Surrender to the Use of his Will might be necessary; yet the *Cestuy que Trust* cou'd make no such Surrender, for he had no Estate in the Lands; and if Copyhold Lands were in Mortgage, yet the Mortgagor might devise the Equity of Redemption without any Surrender, for he had no Estate in them whereof to make any Surrender, and for that Point the other Side gave it up.

And the Lord *Keeper* said he saw no Reason to vary that Decree, for he thought such future Interest was devisable as well as if it had been in Possession, and that the Lands and Money were actually bound from the Time of the Articles, and that the Heirs might have compelled the Executors to have paid the Money in Case there had been no Will, &c. and so affirm'd the Decree.

Note, It did not appear in this Case that the Testator had any other Estate of Freehold, or Inheritance, and so the Devise in such Manner was sufficient to describe that Estate so as to carry it by the Will.

Gibbs *versus* Bernardistone.

IN this Case 'twas held clearly, and decreed, that a Devise of a Personal Estate to one and his Issue; or to one, and if he dies without Issue the Remainder over to another, that the Devise over is void, and that the whole Interest vested in the first Devisee, so as to be liable to his Debts. And *Vernon* said that the Reason that a Devise over of such Personal Estate upon a Life only was good, was because in Construction of this Court the first Devisee had but the Use of it, and not the entire Property.

Devise of Personal Estate over in Remainder void.

Colefworth *versus* Bangwin & al^s, Executors of Henry Darby.

I Did not hear this Cause open'd, but upon the Argument of Council it appear'd to be, that the Testator having Debts to the Amount of 50 *l.* owing to him from the Defendant, did by his Will forgive him that Debt, and gave him 50 *l.* more, and some Household Goods to the Value of 100 *l.* so that in all he gave him about 200 *l.* and made him and the Plaintiff Executors, and died without making any Disposition of the Surplus of his Personal Estate, which was considerable; and now the Plaintiff brought this Bill against the other Executor for an Account of the Personal Estate; and that he might have the Surplus to himself upon Pretence that the Testator having given the other Executor these Specifick Legacies, intended him no more, and so that the whole Surplus would belong to him.

Devise of a Bond Debt good, though the Debt was paid.

For the Defendant 'twas insisted, that the Plaintiff was a Stranger, and the Defendant a near Relation of the Testator; that he gave him these Legacies only that he might, at all Events, be secure of something, that he took these Legacies in another Capacity than as Executor, and so they could not exclude him of his Share of the Surplus which

which the Law casts upon him as Executor, and so in another Capacity.

Foster and
Munt's Case,
see before.

And the Lord *Keeper* was clearly of this Opinion, and that 'twas a much greater Question, whether this Devise of the particular Legacies to one Executor did not exclude both from any Share of the Surplus, because both came in but in Representation of the Testator, and made but as one Person: And so suppose the Defendant had been made sole Executor, he made it a great Question whether this Legacy would not have excluded him from that Surplus; indeed the Reason urged against it is, that if no such Legacy had been given him he would come in for the whole; and his giving him a Part only, ought not to exclude him from the Residue, which without any such Devise of Part, the Law would have thrown upon him: But the Case of *Foster* and *Munt* settled that long since; and though that Case has of late been shaken in the Case of the Dutchess of *Beaufort*, and in *Littlebury's* Case in the House of Peers, yet they were because the Legacy given to the Executor was no beneficial Legacy, so as to exclude him from the Surplus, because Mourning was a Decency required on such an Occasion; but this Legacy here to the Executor was a beneficial one; but this not being the Point in Question, he made no Decree concerning it, but decreed that the Executors should come in equally for their Share of the Surplus of the Personal Estate, notwithstanding these specifick Legacies to one Executor.

Note, If the Case be as has been lately held, yet it seems no Contradiction to *Foster* and *Munt's* Case which was decreed only upon the Fraud in the Executor, as the Lord *Guernsey* declar'd.

Povey & Brown *versus* Amhurst & al.

The same Day.

IN this Case one *Selby*, Uncle to the Defendant's Wife, had by his Will given her 1000 *l.* Legacy whilst she was Sole; afterwards on a Treaty of Marriage, 'twas agreed by Articles, that 700 *l.* of this Legacy should be applied towards Payment of his Debts; and after his Marriage the Defendant, without his Wife, assigns the remaining 300 *l.* to the Plaintiffs, who were Creditors likewise; and they brought this Bill against the Defendant and his Wife, and the Executors of *Selby*, to have a Satisfaction of their Debts out of the remaining 300 *l.* and 'twas decreed that an Account should be taken, and that upon the Plaintiffs proving themselves to be real Creditors, and that the Assignment was *bona fide*, they were to have a Satisfaction accordingly; and the Residue, if any, of the 300 *l.* was to be put out, for the Benefit of the Wife.

I

Whitthill

Whitthill and Phelps.

THE Case upon Opening, appears to be this : One *Mary Phelps*, Widow of *Charles Phelps*, having a considerable Fortune, and several Children, on Treaty of a second Marriage with one *John Whitthill*, agreed he should have only 600*l.* of her Fortune, and the Residue to be settled for her separate Use, and after her Death, for the Benefit of her Children; and accordingly an Indenture was prepared and executed before Marriage, whereby she with his Consent, assigns over her Fortune to Trustees in Trust, that she should receive the Profits of it for her own separate Use during her Life, and after her Death, that the same should go and be equally divided amongst the Children; and *Whitthill*, in Consideration of the said intended Marriage and Marriage-Portion of 600*l.* makes a Settlement on her, and at the End of the Deed covenants, that if the said *Mary* should survive him, then his Executors or Administrators should deliver and pay to the said *Mary*, 600*l.* out of the Personal Estate. The Marriage takes Effect, *Whitthill* dies Intestate, and without Issue, in 1709, and about a Year after, *Mary* makes her Will, and the Defendant her Son Executor, and dies; the Defendant likewise obtained Administration to the Husband, but that was afterwards revoked, and granted to the Plaintiff his Mother, who brought this Bill, for an Account and Distribution of the Intestate *Whitthill's* Estate; the Defendant by his Answer insisted, that *Whitthill* was a Freeman of *London*, and so on his Death, his Widow was intitled to the 600*l.* in the first Place, pursuant to the Marriage Agreement, and to the full Moiety of the remaining Personal Estate, as his Widow by the Custom of *London*, and to a Moiety of the remaining Moiety by the Statute of Distributions; and now she being dead, the Defendant as her Executor, stood in her Place, and had the same Right as she herself had.

'Twas argued for the Plaintiff, that this 600*l.* which the Husband had covenanted, should be paid her by his Executors, in Case she survived, must be taken to be in Satisfaction of her Customary Part, tho' there were no Words to that Purpose; that this was a compounding for a Customary Part, and being before Marriage, by the Custom of the City, bound her from demanding more; that in this Case, she had waved any Right under the Custom, by making a particular Division for herself before-hand; and Mr. *Vernon* cited a Case of *Lee and Pitt*, decreed by *Cowper*, where a Man and Woman before Marriage, agreed by Articles to settle 2000*l.* upon themselves and their Issue, and a Covenant from the intended Husband, that if the Wife survived, she should have this 2000*l.* at her own Disposal; the Wife survived, and the Husband being a Freeman, this 2000*l.* was decreed not only to be in Satisfaction of, or as a Composition for her Customary Part, by the Custom of *London*, but also to exclude her from any Share by the Statute of Distributions in the Husband's Estate, though dying Intestate; and that this Case stood now in the Paper to be re-heard, and though

Custom of
London, as to
Freemens
Widows.
See Equity
Abr. 209.

perhaps the Court may not go quite so far now, yet certainly, it ought to exclude her from any Customary Part.

On the other Side it was endeavoured to distinguish this Case from that which was cited, that here it was only her own 600 *l.* back again, and that could be no Composition for any Share she might be entitled to of her Husband's Personal Estate; but here it was only giving her back her own again.

But Lord Keeper directed it to be in Satisfaction of her Customary Part, and took Notice, that the Deed was expressly worded, in Consideration of Marriage, and as a Marriage Portion, so that he was absolute Master of that 600 *l.* and so it must be looked upon to come out of his Personal Estate; but as to a Moiety of the other Moiety, upon the Statute of Distributions, there was no Question made of it, but the Widow would be entitled thereto, and an Account was decreed accordingly.

Note, for the other Moiety, which belonged to the Intestate, the Custom of *London* gives no Direction, where there are no Children; and so that is wholly under the Direction of the Statute of Distributions; but the Custom of the Province of *York*, extends to give such Moiety to the next of Kin to the Intestate; and in the principal Case, the Master of the Rolls was of the same Opinion, and took Notice, that the Deed was expressly mentioned to be made between the Parties, Citizens of *London*, so that the Custom of the City might well be supposed in their View; and so that compounding for the 600 *l.* in all Events, exempted her out of the Reason of the Custom, which was to provide for those, who should be otherwise left without any Provision, and here she would not trust to the Customary Provision, and so ought to have no Benefit by it. *Quere* also, if the Custom was not intended for Orphans.

Orme *versus* Smith.

Ademption
of Legacies
See Equity
Abr. 302.
1 Vern. 681.

Ademption
of a Legacy.

THE Defendant's late Husband made his Will in Writing, and thereby amongst other Things, he devises as follows, *viz.* I give and devise unto Mr. Thomas Orme, my good and only Uncle, the Sum of 500 *l.* that is to say, that Bond and Judgment which he gave me for 400, and 100 *l.* in Money; and makes his Wife the Defendant Executrix, and desires her to be kind and assisting to his Uncle, that he might live as became a Gentleman. The Uncle afterwards sold an Estate, and with the Money paid off 320 *l.* and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining 80 *l.* and some Time after the Testator died; and now the Uncle, the Plaintiff, having Notice of the Will, brought his Bill here for his Legacy of 500 *l.* The Defendant insisted, this was a specifick Legacy of that particular Bond and Judgment, and they being cancelled and altered before the Testator's Death, it was an *Ademption of the Legacy*, and so the Plaintiff could have no Right but to the remaining 100 *l.* and cited *Ray* 335. *Paulet's Case*, and the Case of *Theobald and Wynne*, cited there. *Swinb.* 450, 452.

On the other Side 'twas insisted for the Plaintiff, that upon these Books, the Diversity is, where the Money is paid voluntarily in by the Person who owes it, and where the Testator sues for and recovers it, in the first Case the Legacy continues still good, because Money only comes Home to the Personal Estate; but in the other Case, the Testator suing for it, shews that he intended to make it his own, and so would not leave it to the Legatee to recover.

And the Lord Keeper was clear of the same Opinion, and decreed the 80 l. Bond to be delivered up, and the Residue of the Legacy to be paid, but gave no Costs; also 'twas said, that the Justice of the Uncle ought not to prevent the Affection of the Nephew, no Alteration of his Intention appearing.

Bill *versus* Commissary Hyde & ux'.

ON a Motion for Discharge of the Defendant's Wife, who was taken upon an Attachment for the not appearing and answering the Plaintiff's Bill, the Case appeared to be thus: The Defendant's Wife being a Widow, and having a considerable Fortune, upon the Defendant's Application to her by Way of Marriage, proposed the settling her own Fortune upon herself separately, wherewith he was not to intermeddle; and accordingly, before Marriage, a Settlement was made and executed, and the Marriage took Effect. Some Time after, the Defendant being very much in Debt, was arrested, and the Creditors were going on to take out Execution and to seize his Goods; but to prevent that, the Wife gave a Note, that if they would discharge the Action, which was for 2000 l. she would pay the Debt out of her own Personal Estate; and accordingly the Action was discharged; but she afterwards refused to make good her Agreement; and now this Bill was brought to enforce an Execution thereof. The Bill was brought against the Husband and Wife, and Trespafs taken out against both, and actually served upon the Wife at her House, but the Husband could not be found; after which, neither the Husband nor Wife appearing, an Attachment was taken out against both, and the Husband still keeping out of the Way, the Wife was taken upon the Attachment, and now moved to be discharged, on several Affidavits that her Husband was actually gone to *Holland* before the Filing of the Bill, and so Process against her without her Husband was irregular, and that she ought to be discharged, and 'twas said, at Law there could be no proceeding against the Wife without her Husband, and that Equity followed the Law in this Particular.

A Feme Covert, to appear and answer without her Husband.

On the other Side 'twas said, that the Wife in this Case was not to be considered as a *Feme Covert*, that she having an Estate settled on her before Marriage, for her separate Use, this made her a *Feme Sole*, and a separate Person from her Husband, and so her Agreement was binding upon her; that they had done all they could to bring in the Husband; that they had made him a Party to the Bill, taken out a *Supæna* against him and his Wife, and for not appearing, they have taken

taken out an Attachment likewise against both; that if they could not in this Case proceed against the Wife, the Justice of the Court would be eluded, and it would be easy for any Man to settle all his Estate upon his Wife, and then get out of the Way, and so bid Defiance to his Creditors. And Sir Joseph Jekyll said, 'twas the Saying of a very great Man, *Est boni Judicis ampleare Jurisdictionem*, and he thought to extend the Arm of Justice farther then usual; when otherwise there would be a failure of Justice, was the Duty of every Court; that in some Cases a Woman may sue without her Husband; and nothing was more common than for a Wife in this Court, even to sue her own Husband; and surely in this Case, the Plaintiff ought not to lose the Benefit of the Wife's Agreement, by her sending her Husband Abroad; and cited a Case of *Duboise and Dowle* to this Purpose. But the Lord Keeper seemed to be of Opinion, that the Process in this Cause, without the Husband, was irregular, and that they ought to stay till the Husband's Return, when they might renew the Process against both. To which 'twas answer'd, Suppose the Husband should never return, must they then be totally deprived of the Benefit of this Agreement? On which my Lord Keeper said, he would ask the Master of the Rolls's Opinion, and be govern'd by that; and afterwards the Master of the Rolls coming into Court, was clearly of Opinion, that the Process in this Case without the Husband was regular, that the Husband was joined in the Suit only for Conformity, and said, a Woman by her Marriage, did not lose her Understanding or Discretion, but rather improved it by her Husband's teaching, and cited *Moor and Hufsey, Hob. 93.* where several Cases are cited, wherein a Feme Covert without her Husband, shall be chargeable, and said the Practice of this Court had been constantly so; on which the Defendant prayed Time 'till the first Day of next Term, to put in her Answer; and on her entring, her Appearance with the Register, and paying the Costs of the Motion, 'twas granted, and she too discharged out of Custody.

Note, *How* in this Case moved, that the Defendant ought not to be heard to move for her Discharge, because she not having appeared by her Clerk in Court, was not at all in Court, but a perfect Stranger, and so could not regularly make any Application by her Council, 'till she had brought herself into Court, by directing her Clerk to enter an Appearance for her; but of this no Notice was taken, either by the Court or Council on the other Side. *Vid. Compleat Attorney, 326, 328.*

Anonymous.

A Messenger
to bring in
the Party.

THE Plaintiff's Bill being dismissed with Costs, and Costs taxed to 160 l. a *Subpœna* was awarded against him to pay these Costs, and for not obeying it, an Attachment, on which Attachment the Sheriff of *London*, to whom it was directed, took Bail, and returned a *Cepi Corpus*, and now on this Return, a Motion was made for a Messenger against the Plaintiff, and 'twas urged to be the Course of the Court, that a Messenger should go in all Cases, where the Sheriff takes Bail,

where

where the Party is notailable, as in this Case he is not, and the rather, for that in this Case the Bail Bond was taken of a Member of Parliament, against whom (the Parliament being now sitting) they can have no Remedy; and *Hawkins's* Case was cited, where in a like Case, a Messenger was sent to bring in the Party, and so 'twas ordered in this Case.

Huning versus Ferrers.

THE Plaintiff having a Lease of certain Mills for 12 Years, which were near expired, the Lessor, upon his Marriage, makes a Settlement of those Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his own right Heirs; afterwards the Plaintiff takes a new Lease of these Mills from the Father for 30 Years, and lays out 2800*l.* in new Building, and improving them. The Defendant was the eldest Son of the Issue Male of the Lessor, and during the Time the Plaintiff was making the Improvements, went to his Father, and told him, he had not Power to make any such Lease; that after his Death, the Estate would be his, but never acquainted the Plaintiff with that, or of the Settlement made on his Father's Marriage; but on the contrary, writ to the Plaintiff to take Care to keep one of his Mills in particular in Repair; then the Father dies, and the Son recovers in Ejectment against the Lessee, who thereupon brought this Bill to be quieted in the Possession of the Mills, during the Residue of his Lease, for that the Defendant was fully acquainted with the Circumstances of this Lease, and knew his Father had not Power to make it, and yet never forbid or cautioned the Plaintiff from going on with the Repairs, but on the contrary, stood by, and encouraged him in the Proceeding therein; and so the Plaintiff had a Decree to hold, during the Residue of his Term; for though the Defendant was not Privy to the making of this Lease, but that was only the Fraud of the Father, yet he being to have the Estate after his Father's Death, and taking Notice thereof to his Father, and that he had not such Power to make any such Lease, and yet suffering the Plaintiff to go on in the Repairs thereof, with a Design to reap the whole Benefit thereof when his Father was dead, was such a Fraud and Practice in him, as ought to be discountenanced in this Court. For *Qui tacit consentire videtur*; and *Qui potest & debet vetare jubet*. And it was decreed, that the Plaintiff should enjoy, during the Residue of his Lease. See 2 *Lev.* 152. *Edlin versus Battaley* in Chancery.

Where Notice to a Remainder Man, confirms a void Lease.

C A S E S

Heard and Decreed in Chancery,

Tempore GEORGE II I^{mi}.

Sayer versus Sayer.

A MAN by his Will gives all his Personal Estate in *Wanstead*, except his Bed and Bedding, to *J. S.* and afterwards devises 300 *l.* out of his Personal Estate, and his Houses in *Cannon-street*, to the Plaintiff, who now brings his Bill for Discovery of Assets, and to charge the whole Personal Estate with the Payment of his Legacy; and it was proved in this Case, that the Testator at his Death was possessed of a Coach and Horses at *Wanstead*, and that there was likewise some Arrears of Rent due to him at his Death out of Lands at *Wanstead*, to the Value of about 300 *l.* besides the Houses in *Cannon-street*. The first Question was, Whether the Devise of all his Personal Estate at *Wanstead* was not such a Specifick Devise thereof as to exempt it from coming in aid of the other Personal Estate towards Payment of this Legacy. Another Question was, Whether the Coach and Horses, and the Arrears of Rent at *Wanstead*, passed likewise as Part of the Specifick Legacy: And my Lord Chancellor, *Cooper*, decreed, That the Personal Estate at *Wanstead* was not to be applied towards Payment of the 300 *l.* Legacy; *First*, Because it appear'd that the Testator had a Personal Estate over and above that at *Wanstead*, to the Value of about 300 *l.* and his Intent seems plainly to charge that alone with the Legacy, he not having devised it out of all his Personal Estate whatsoever, or wheresoever, or incerted any Words to shew that his whole Personal Estate should stand charged with it. *Secondly*, Because he having such other Personal Estate, to the Value of about 300 *l.* which he might presume sufficient to answer that Legacy, yet as a Supplement to and the Deficiency of it, in case it should fall short, he has likewise charged his Estate in *Cannon-street* with it, which shews he has intended to provide for it out of some other Fund, and not out of his Personal Estate in *Wanstead*, which he had before specially given to another; but the Case might so happen, that a Specifick Legacy shall be charged with the Payment of a Pecuniary Legacy, as in this

Michaelmas
Term.
7. G. in Court.
Devise of all
his Personal
Estate passes
all he had at
the Time of
his Death, &c.
See 2 Vern.
418, 747, 739,
538, 539.

Case ; after he had devised his Personal Estate at *Wanstead*, if he had likewise devised his Personal Estate at such another Place, and then devised such 300 *l.* Legacy out of his Personal Estate generally, and died, having no other Personal Estate than in the two Places before-mentioned, this 300 *l.* Legacy must come out of his Personal Estate at large in both Places, tho' otherwise Pecuniary Legatees generally are to abate in Proportion where the Personal Estate, not specifically devised, falls short to answer their Legacies, and shall have no Aid of the Specifick Legatees to make up their Pecuniary Legacies, especially if they are devised generally and at large, without saying out of his Personal Estate, or out of all his Personal Estate whatsoever, or Words to that Effect ; and it was agreed clearly, that this Devise of his Personal Estate at *Wanstead* was as much a Specifick Legacy of it as if he had enumerated the several Particulars of it. Secondly, It was decreed that the Coach and Horses were Part of his Personal Estate at *Wanstead*, where he lived ; for since there is no other Period for fixing this when a Devise shall take Place but the Instant of the Testator's Death, and you can't say that what he had a Week or a Fortnight, or any other Time before his Death, should pass, rather than what he had at any Time longer ; therefore in Case of a Personal Estate which is fluctuating and changing, the Instant of his Death is the only Time to ascertain it, and we have therein no other Rules in Equity for the Construction of Wills than what are at Common Law, and here at his Death the Coach and Horses were at *Wanstead*, so for the Arrears of Rent they are Part of his Personal Estate at *Wanstead*, for they were issuing out of Lands there, and no where else ; and for the Objection that the Devise of the Personal Estate at *Wanstead* should carry only his Household Goods, because he thereout excepted his Bed and Bedding, which was urged as an Argument of his Intent to pass only Things of the same Nature with those he had excepted ; this was look'd upon as an Objection of no Weight at all at the Bar, and the Court took no Manner of Notice of it.

Atkins *versus* Dawbury.

What Things
or Interests
may be assign-
ed over. See
1 Chanc.
c. 232.
3 Chanc.
Rep. 90.
1 Roll. Abr.
380.
2 Vent. 362.
2 Vern. 391,
428, 595, 764.
563.

A MAN by his Will gives a Legacy of 300 *l.* to a Feme Covert without creating any separate Trust of it, for her Benefit, and this Legacy was made payable out of a Reversion of Land expectant on an Estate for Life : The Husband of the Legatee, some Time after, makes an Assignment of this Legacy to Trustees in Trust, and for the Benefit of his Children, and after by his Will takes Notice again of the same Legacy, and devises it in like Manner for the Benefit of his Children, and makes his Wife, to whom the Legacy was originally given, his Executrix, and dies : The Estate for Life drops, and the Widow applied to the Executor of the first Testator for the 300 *l.* Legacy, and thereupon she and the Executor comes to an Agreement that she should accept of 200 *l.* only, in full of her said Legacy, and accordingly the Land was sold (the Widow joining in the Sale)

Sale) the 200*l.* paid, and the Widow gave a Release for her whole Legacy; and now this Bill was brought by the Children to have the Benefit of this 300*l.* under the Assignment and Will of the Father: It appeared in this Cause that tho' she was Executrix to her Husband, and knew not only of his having devised the 300*l.* for the Benefit of his Children, but also of his Assignment thereof, in the Manner before-mentioned, yet that she gave no Notice, or said any thing of it to the Executor: And the Court decreed, That forasmuch as the Husband who had a Power to extinguish or release this Legacy, had made a good Assignment thereof in Equity (tho' as a Chose in Action it was not assignable at Law) 'tis actually recovered; and having again by his Will confirmed that Assignment, and given it again in the same Manner, bound the Wife the Legatee; and she giving no Notice of this Assignment to the Executor, should be answerable to the Children for the 200*l.* she had receiv'd against her express Knowledge of the Childrens Title to it; but as to the other 100*l.* which the Executor had drawn her in to release, that he himself should stand charged, to answer that to the Children, he being thereby no Ways injured, since he ought at first to have paid the whole Legacy; and tho' this Legacy was charged on a Reversion which was not an immediate Fund for the raising it, yet being given to the Wife *in presenti*, when the Wife comes in it shall carry Interest from the Testator's Death, which must likewise go to the Children.

Note.

See 2. *Atk.* 110.

Sir John Talbot and Ivory, versus Duke of Shrewsbury, & al.

IN this Case, it was said by Mr. *Vernon*, and agreed by the Master of Rolls, that if one be indebted to another in a Sum of Money, and does by his Will give him as great or a greater Sum of Money than the Debt amounts to, without taking any Notice at all of the Debt, that it shall nevertheless go in Satisfaction of the Debt, so as that he shall not have both the Debt and Legacy, but if such a Legacy was given upon a Contingency, which if it should not happen, the Legacy would not take Place, in that Case though the Contingency does actually happen, and the Legacy thereby become due; yet it shall not go in Satisfaction of the Debt, because a Debt which is certain shall not be lost, or merged by an uncertain and contingent Recompence; for whatsoever is to be a Satisfaction of a Debt, ought to be certain in its Creation, and at the very Time it is given; which such contingent Provision is not; and cited the Case of one *Pollexfen*, to be so decreed by my Lord Chancellor *Harcourt*, and affirmed on Appeal in the House of Lords; and as it is in the Case of a Will, so 'twill be likewise, if the Provision were by Deed; If the Provision be absolute and certain, it shall go in Satisfaction of the Debt; but if it be uncertain and contingent, it can be no Satisfaction, because it could not be so in its Creation; and the happening of the Contingency after, will not alter the Nature of it. Another Point in this Case was, that the Lands were devised to Trustees

An uncertain or contingent Provision, no Satisfaction for what was certain.

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in Trust, out of the Rents and Profits (without saying, *or by Sale or Mortgage*) to raise Money to pay Debts, and to settle the Lands themselves for several Uses; but because it appeared, that the Rent and Profits of the Lands annually, would not satisfy the Debts in any reasonable Time, an Account was directed to be taken of the Testator's Personal Estate, and what that fell short to pay the Debts, was to be made up by a Sale of Part of the Real Estate; and the Master of the Rolls said, this was the common Course of Equity, where the Rents and Profits are not sufficient to pay the Debts in a reasonable Time; but if it had been devised, to be raised out of the Rents only, it had been otherwise.

Thompkins versus Thompkins.

Daughters
Portions,
charged on
Stock and
Real Estate,
how to be
raised. See
Abr. Eq. 335,
336, &c.
1 Vern. 219,
336, 7, 452,
458.
2 Vern. 321,
458, 460, 665,
640, 760.
3 Chanc.
R. 190.
1 Salk. 159.

The Courts
Opinion.

Notes.

THE Plaintiff's Father by his Will in 1682, devised 500 *l.* apiece to the Plaintiff his Daughter, and to two other Daughters, to be paid at their respective Ages of 21 Years, or Days of Marriage, which should first happen: The said Portions to be raised, and paid out of his the said Testator's Stock, and then devises the rest of his Real Estate to his Wife for Life, and in Lieu, and in Satisfaction of her Dower, and for the Maintenance and Education of his Children, and also for and towards the raising and making up the said Portions to his said Daughters, and then goes on, *And after my Debts and Legacies paid and satisfied, I give and devise all my Lands, Tenements and Hereditaments to my Son* (one of the Defendants) *and his Heirs*, and makes his Wife and the Defendant his Son Executors and dies, leaving not in Stock above the Value of 100 *l.* The Wife enters, and the two other Daughters marrying, had their Portions paid; and this Bill was brought by the third Daughter, who had attained her Age of 21, and was unmarried, to have her Portion; the Wife had been dead for some Time, and the Defendant the Son and surviving Executor insisted, that his Lands ought not to be charged with the raising this Portion, in regard, 'twas directly expressed to be raised out of the Stock, and the Rents of the Estate during the Wife's Life; and that if the Wife had exhausted, or consumed the Surplus of the Rents, which should have raised the Plaintiff's Portion, she ought to follow her Assets; or however, that the Plaintiff could not lay the Load on his Estate, if the Wife left no Assets. But the Court was of Opinion, that in this Case, the Defendant's Estate was chargeable to make up the Portion to the Plaintiff; for several Gradations in his Will shew, that the Portions were at all Events to be made good to his Daughters, and therefore he charges them on his Stock, and afterwards devises them to be made up out of the Surplus of his Rents, during his Wife's Life, and afterwards gives the Land to his Son, subject thereto, by devising them to him after his Debts and Legacies paid, which in a Will, amounts to a Charge on his Lands for Payment thereof, since the Son by the Will, is not to have the Lands, 'till after the Debts and Legacies paid; and therefore 'twas decreed, that an Account should be taken of the Stock, and what the Proportion thereof (after a proportionable Deduction for the

the other two Legacies) fell short, should be made up out of the like proportionable Surplus of the Rents, during the Wife's Life; and that if they fell short, to be supplied out of the Defendant's Estate. But it was not determined with any Clearness, whether, if the proportionable Part of the Stock, and of the Surplus of the Rents, which were appointed the Fund, in the first Place, for the Payment of these Legacies, were wasted by the Wife; whether the Loss thereof, as to the Plaintiff's Legacy remaining unpaid, should fall upon the Plaintiff herself, or if she should, by Reason of such wasting, load the Real Estate so much the heavier, to make good her Legacy; though my Lord Chancellor seemed to incline, that her Legacy, as this Case was, should be made good to her at all Events, out of the Real Estate, in Case the other Funds provided for it proved deficient, or were wasted, or at least so much thereof, as by any Misapplication during her Minority, was lost and gone of the other Fund; though he said, from the Time of her attaining her full Age, it might perhaps, deserve another Consideration. Another Point in this Case was, that the Defendant the Son had mortgaged this Estate to some other of the Defendants, who had full Notice of the Will, as was proved in the Cause, and whether they should be affected with this Legacy, was the Question; though there was little said, in Defence of this Point, but that the Defendants were only Executors of the Mortgage, and knew nothing of the Transactions in taking the Mortgage. And Mr. Vernon argued, that in this Case, if there could be any Doubt made of it, as he thought there could not; yet, that the Defendant the Son, who received the Money, would be chargeable therewith, and that the Plaintiff might in the Nature of a *Cestuy que Trust* prosecute him as a Trustee, for a Recompence thereto, 'till her Legacy paid; and cited the Case *Cherrys* and *Ferrars* in this Court, to have been so decreed; but my Lord Chancellor seemed to turn this reasoning upon him, that there the Wife for the proportionable Part of the Surplus, was but in Nature of a Trustee, and the Plaintiff must expect her Recompence for what she had wasted out of the Assets, and not load her Son therewith; but yet he was decreed to an Account, as before was mentioned.

Note. M. B.

Lingen *versus* Sonray.

ON a Treaty of Marriage, Articles were entered into, whereby the Sum of 700*l.* being the Wife's Portion, and 700*l.* added to it, on the Part of the Husband, in all 1400*l.* was agreed to be laid out in the Purchase of Lands, to be settled on the Husband's Life; Remainder to the Wife for Life; Remainder to the first and other Sons of the Marriage in Tail Male successively; Remainder to the Issue Female of that Marriage; Remainder to the right Heirs of the Husband. The Marriage takes Effect, the Husband dies without Issue, and before any Purchase pursuant to the Articles, having first made his Will, and thereby he devises all his Personal Estate to the Defendant, who was his Wife, and devises all his Real Estate to the Plaintiffs, who were his Nephews;

S. C. 1. R. H. by
172. *Acc. in Cha.*
400. *In latter*
books in
same words
as here.
Devise.
What Estate
or Interest
may be de-
vised, &c.
See 3 Lev.
427, 428.
1 Rol. Abr.
378. 2 Salk.
237. 2 Chan.
c. 144.
2 Vern. 679.

and one of them, his Heir at Law, makes his Wife Executrix, and takes no manner of Notice of the 1400 *l.* and whether the 1400 *l.* should go to the Nephews, as they should have the Lands, *i. e.* after the Wife's Death, if the Purchase had been pursuant to the Articles, was the Question. It appeared in the Cause, that the Wife at the best Computation that could be made, had above 77 *l.* a Year by the Devise to her, of the Personal Estate, which was 7 *l.* *per Ann.* more, than she would have been entitled to, in Case the Purchase had been made; and therefore 'twas decreed, the 1400 *l.* was bound by the Articles, and should go to the Plaintiffs as the Land would have done, if a Purchase had been made pursuant to the Articles; and was in a Court of Equity, to be looked upon as a Real Estate, and well devised to the Plaintiffs by this Will; and though the Wife could not be shut out of the Provision intended by the Articles for Life, if she thought fit to abide by the Articles, yet the Devise there, of the Personal Estate, being more than an Equivalent, if she chose to take by the Will, it must in this Court of Equity, be taken to be a Satisfaction of the Articles as to her Right, and no Manner of Hardship to her; and 'twas said, as the Case was, if a Purchase had been made, even after the making this Will, though at Law such Lands would not pass, yet in this Court, there could be no Question, but the Plaintiffs would have the Benefit thereof, by the Relation to the Articles. And my Lord Chancellor was clear of the same Opinion; and Mr. *Vernon* said, it had been several Times held in this Court, that if a Man by his Will give several specifick Legacies, and devises the Residue of his Estate to another, and after his Circumstances alter, so that the Residuary Part, becomes very inconsiderable; yet the Residuary Legatee must content himself with it, and must have no Assistance from the specifick Legatees, no more shall the Wife, in this Case, when the Plaintiffs come to carry the Articles into Execution, which will take away so much of the Personal Estate; and this being so decreed by my Lord Chancellor *Harcourt*, was now on rehearing, affirmed by my Lord Chancellor *Cowper*.

Reach versus Hammond.

A Devise of the Personal Estate to his Relations, is to go according to the Statute of Distributions. See 2 Vern. 106, 153. 3 Chan. R. 1. 1 Chan. R. 211, 224. 2 Vern. 405, and 720.

J. C. Proc. in the Aff. in some words as if it were a devise to the Defendant, to the Use of his Relations, without specifying any in particular, or using any other Words, and makes the Defendant his Executor, and in 1706 dy'd; and now the Plaintiffs who were the Mother, and three Sisters of the Testator, brought this Bill as his nearest Relations, for a Discovery, and an Account of the Personal Estate; it appears in the Cause, that the Testator left no Real Estate, and 'twas referred to a Master, to take an Account of the Personal Estate, and the Plaintiffs to come in according to the Course of Distribution, settled by 1 Jac. 2. c. 17. And 'twas agreed to be the Rule of this Court, in Constrution of such Devises to Relations, that those, who by the Statute of Distributions, would be entitled to the Personal Estate, in Case he had died intestate, should upon such general Devises, be

be let into the same Proportion : And my Lord Chancellor said, he thought it the best Measure for settling Bounds to such general Words, and that it had been oftentimes ruled accordingly in this Court. *And by this Rule I conceive Colonel Norton's Will may be regulated.* W. B.

Beale versus Beale.

THIS was on a Re-hearing ; and the Case appeared to be shortly thus. The Plaintiff's Father being Tenant for Life, which Remainder to his Brother in Tail, prevails with his Brother to join with him in a Common Recovery, whereby the Estate was settled to the Use of the Plaintiff's Father for Life ; Remainder to Trustees, during his Life, to support contingent Remainders ; Remainder to such Woman as he should happen afterwards to marry, for her Life, for her Jointure ; Remainder to the first and other Sons of the Plaintiff's Father, in Tail Male successively ; Remainder to the Brother in Tail ; Remainder to the right Heirs of the Plaintiff's Father ; and in the Deed, declaring the Uses of the Recovery, was a Proviso, that it's held to be lawful for the Plaintiff's Father by Writing or last Will, to charge the Estate with any Sum or Sums of Money, not exceeding 2000 *l.* for the Portion of Daughters or younger Sons, to be paid at such Times, and in such Proportions, as the Father should direct : The Father afterwards marry'd the Defendant, and by her had Issue two Daughters, the now Plaintiffs, and by his Will, taking Notice of his Power, appoints the Sum of 2000 *l.* to be raised out of the said Estate, for his said two Daughters, to be paid, and payable to them at their respective Ages of 21 Years, or Days of Marriage, which should first happen, without saying after the Death of his Wife, or any other Proviso, that it should not affect the Wife's Jointure. Then the Father dy'd, and now this Bill was brought by the two Daughters, who were under 18, and unmarried, to have Interest for their Portions, 'till payable. My Lord Chancellor *Harcourt* decreed, that they should have Interest, after the Rate of 3 *l. per Cent.* for their Portions, 'till 12, and from thence, 'till payable, at 4 *l. per Cent.* but they not liking this Decree, brought on the Cause again, and pressed much for an Allowance of 6 *l. per Cent.* for their Portions 'till payable ; but Lord Chancellor *Cowper* said, he thought the former Decree very tender in the Provision thereby made, and that 'twas rather a Recommendation to the Mother, to make them that Allowance, than a Decree to charge her Jointure therewith ; but since they were not satisfied by that Decree, as appeared by their bringing the Cause to a Re-hearing, he must now give them no more, than what in strict Justice they deserve ; and since their Portions was not payable 'till 18 or Marriage, they could not charge the Jointress with Interest thereof in the mean Time ; but said, that the Reason of postponing thereof, 'till that Time, being in Favour of the Jointress, she ought to maintain them out of the Profits of her Jointure Lands ; but in Regard the said Portions could not in Strictness carry Interest, 'till they became payable, they should be allowed 6 *l. per Cent.* on the

The Interests of Daughters Portions decreed for their Maintenance. See before *Greenhill's Case*, and *postea*, *Lord Coventry's Case*, 2 Vern. 236.

same, from that Time. But whether the Portions, on the Daughters attaining the Age of 18 or Marriage, should be immediately raised, so as to charge and affect the Jointure Estate for Life, or wait 'till her Death, my Lord said, it would be Time enough to consider of that, when it became the Case.

Atkins & al' versus Waterfon.

What shall
bar a Free-
man's
Widow of
her Custo-
mary Share.
See Abr. Eq.
157, 158.
1 Vern. 132.
2 Vern. 110.
Vide Ante.

ON a Treaty of Marriage, to be had between the Defendant's late Husband, *Edmond Waterfon*, deceased, Indentures of Lease and Release, bearing Date the 15th and 16th of *August*, 1696, by Way of Settlement, were executed, whereby, in Consideration of the said intended Marriage, and 2000*l.* Marriage Portion, Lands to the Value of 200*l.* *per Ann.* were limited to the Defendant's Life for her Jointure, and in full of all Dower, and Title of Dower, to any Lands, Tenements, or Hereditaments, whereof, or wherein her said intended Husband was, or should be seized of any Estate of Inheritance, during the Coverture between them. And in the Release, *William Waterfon*, Father to *Edmund*, covenanted, that in Case *Edmund* survived him, that then all his Real and Personal Estate, whereof he should die seized or possessed, should descend and come to *Edmund*, his Heirs, Executors and Administrators: The Marriage took Effect: *William Waterfon* dies, whereby some Real Estate, and a considerable Personal Estate came to *Edmund*; then *Edmund* makes his Will, and having no Issue, devises 500*l.* to his Wife, and some other Legacies, and devises the Residue of his Personal Estate, to be laid out on a Purchase, to be settled on the Plaintiffs the *Bennels*, who were his Nephews, and made the Plaintiff *Atkins* his Executor and dies; and now this Bill was brought against the Widow, for a Discovery, and Account of the Personal Estate, and that it might be laid out in a Purchase and settled, pursuant to the Direction of the Will; the Defendant by her Answer says, That the Husband was a Freeman of *London*, and that he dying without Issue, she, as his Widow, was entitled to a Moiety of the Personal Estate, as her Customary Share, and whether she were so entitled or no, was the single Question.

For the Plaintiff 'twas urged by Sir *Jos. Jekyl* and others, that she was not; for that by this Settlement, she was provided for already, and by the Custom of *London*, where the Widow is compounded with, as they call it, she cannot be let into any other Part of her Husband's Personal Estate; that this was founded on very good Reason, that the Wife may not depend for her Satisfaction on the Casualty of Trade, and other Contingencies, whereto this Personal Estate may be liable; and now, since she had in all Events, secured herself of a Provision, and taken out so much of her Husband's Power of disposing, so she ought to rest satisfied with that Provision, and not to ask any more; that if this had not been intended in full of her Customary Part, there would have been Negative Words, or some proviso in the Settlement, that it should not extend to exclude her of her Customary Share; that

the Personal Estate was under their Consideration, as appears by the Covenant, concerning the Disposition of it, in Case the Husband survived the Father, and now the Provision being general, must be intended to be compleat, and must exclude her from any other, and cited *Love's Case*, 33 *Car. 2.* and *Hancock and Hancock*, and *Pitt and Lee*, lately decreed in this Court.

But on the other Side, 'twas argued by *S. Cowper & Al.*, that she ought not by this Settlement, to be excluded from her Customary Part; that if no Settlement had been made, she would on her Marriage, be entitled to Dower at Common Law out of the Real Estate, and to her Customary Share out of the Personal Estate; that this Jointure came only in lieu of Dower of the Real Estate, and that, but by a late Act of Parliament 27 *Hen. VIII.* and now could be no Recompence for her Customary Share of the Personal Estate; that she was entitled to one by the Common Law, and to the other by a Custom and a Recompence provided; for one of them only could be no Recompence for the other, which she claimed by a distinct independent Title; that there being no Negative Words in the Deed, made it the stronger; that they did not intend to exclude her of her Customary Share; and now 'twas try'd up barely in Bar of her Dower and Title of Dower; and suppose by the Settlement, there had been a Provision for her out of the Personal Estate only, and that had been expressed to be in full of her Share of the Personal Estate, Would that have excluded her from Dower out of the Real Estate? no more ought this Jointure, which goes only in Bar of her Dower of the Real Estate, be construed to exclude her from the customary Share of the Personal Estate; and the Entries in the City Books, must be intended, where the Composition was only out of the Personal Estate; and as to the Cases cited, 'twas said, they were not at all to this Purpose, for the Case of *Hancock and Hancock*, was upon a Settlement of Personal Estate, and was to this Effect: A Freeman of *London* having Children by his first Wife, and being about to marry again, made a Settlement of some Leasehold Estate on his intended Wife, and the Issue of that Marriage; the Marriage takes Effect, the Husband dies having Issue, and a considerable Personal Estate, the Children, by their first *Venter*, brought their Bill for an Account of the Personal Estate, and insisted, it wholly belonged to them, and that the second and her Issue, ought to be excluded from any Share thereof, by Reason of the Provision made for them; 'twas decreed, that this Composition with his Wife before Marriage, bound her, but the Children being Infants, were left to make their Election when they came of Age, whether they would abide by that Provision made for them by that Settlement, or relinquishing that, come in for their Customary Shares only; and afterwards on a Re-hearing, what should become of the Customary Part; 'twas held, to fall into the Husband's Share; and in Case no Disposition was made thereof by him, it must go according to the Statute of Distributions; as to the Case of *Pitt and Lee*, that was thus: A Widower and Widow being about to marry, and having a Personal Estate only, by Articles before Marriage 'twas agreed, that in Case the Husband survived, he should have 2000*l.* only

only out of his Wife's Personal Estate, and the Residue to be at her Disposal; and in Case the Wife survived, then she was to have 2000 *l.* out of the Husband's Estate, without saying *only* or *no more*, the Husband being a Freeman of *London*; and his Wife brought a Bill for an Account of the Personal Estate, over and above her 2000 *l.* and to be let into her Customary Share thereof; but 'twas decreed, that the equal Construction of these Articles, must be to exclude the Wife from any further Share out of his Estate, as he was expressly excluded from any further Share out of her Estate; and though the Words were not so full, as to exclude her, yet the Intent of the Articles appearing to be a mutual Reciprocal Agreement between them, for setting Bounds to each others Claim, ought not to be extended larger on the one Side, than the other; and so 'twas decreed, that the Wife should have only the 2000 *l.* but they said, these Cases were by no Means applicable to the present, where the Provision for the Wife only was a Real Estate.

Lord Chancellor said, he thought the Reason of the Case very strong for the Defendant; but that this Point may be settled in a proper Way, he desired to have the Custom certified, whether such Jointure before Marriage, being only limited to be in Bar of her Dower, should preclude her likewise of her Customary Share.

Challis versus Casborn.

A Defective
Surrender,
Gr. made
good. See
2 Chanc.
R. 218.
2 Vern. 163,
565, 585,
609, 680.
1 Vern. 132.
1 Salk. 187.
3 ante,
Mapletoft's
Case.

IN this Case, 'twas said by *Vernon*, and agreed to by the Court, that that if a Man has a Debt owing to him by Mortgage, and another on Bond by the same Person, that he may tack them together against the Mortgagor, and that he shall not be let into a Redemption without Payment of both, because the Lands in his Hands are chargeable with the Bond, even at Law; and now, since the Statute against fraudulent Devises, the Devise of the Equity of Redemption is in the same Case, he can't redeem without Payment of both, because the Statute makes such Devise void, as against Creditors, and then the Devisee stands in the same Place, as the Heir must have done, if no Devise had been made; but before that Statute, such Devise would not be liable to the Bond Debt no more than the Mortgagor himself.

Another Point in this Case was, that a Man seized of some Freehold Estate, and also of Copyhold Estate, devised all his Estate Real and Personal for the Payment of his Debts, and died without any Surrender of the Copyhold Estate to the Use of his Will and Coheir; this Court would supply the Want of such Surrender, as they would have done, if the Copyhold Estate had been expressly mentioned in the Will as Copyhold.

Mr. Williams said, the Master of the Rolls had supply'd the Defect of a Surrender, in the Case where there was no Freehold Estate at all; and he thought it the same Case here, where the Freehold Estate was not sufficient for Payment of the Debts.

But the Chancellor said, he had never known it carry'd so far, because he thought the Devise of the Real Estate did not shew any Intention to pass

pass a Copyhold, which, in the Eye of the Law, was of the lowest Regard, and looked upon only as an Estate at Will, though Custom had now fixed it in the Copyholder; and said, unless they could shew some Precedents, he could not assist them.

A third Point was, that the Devisees of the Real and Personal Estate were made Executors; and so Mr. *Vernon* said, 'twas a settled Distinction in this Court, that they ought to apply the Estate in such Case, in a Course of Administration, because if the Estate was sold, 'twould be Personal Assets in their Hands, and then to pay a Debt of inferior Nature, before one of a Superior, would be a Devastavit; but if they had not been made Executors, then the Creditors should have come in all equally, because in Equity, all Debts are equal, and they as Trustees, could give no Preference, and would be in no Danger as Executors in such Case.

But the Chancellor thought the Accident of their being made Executors, ought to make no Difference in Equity, but that all Creditors should be considered equally, and would see Precedents; though Mr. *Vernon* said, it had been a settled Distinction, and several Precedents in Point.

Basse versus Grey.

SIR *James Grey* being possessed of an Annuity of 14 *l.* per Ann. for 99 Years, out of the Exchequer, on his Marriage covenants with *A.* and *B.* to pay this 14 *l.* to his Wife for her separate Use, and after the Death of either of them, then to the Survivor for Life, and after the Death of both, to the Child or Children to be begotten between them, and in Default of such Child or Children, then to his own Executors and Administrators, for the Residue of the Term. Sir *James* and his Lady have Issue one only Son, who lived to five, and then dy'd, and after the Death of Sir *James* and his Lady, the Plaintiff took out Administration to the Son, and brought this Bill against the Executors of Sir *James* and his Lady for this Annuity.

And 'twas insisted by Mr. *Vernon*, that the Limitations to the Executors and Administrators of Sir *James* was void, being after a Limitation to the Child or Children, which is the same, as if it had been limited to the Issue, and a Settlement of a Term on Trustees in Trust, to permit the Father to receive the Profits for as many Years of the Term, as he should live; and after, to permit the Mother to receive the Profits for so many Years as she should live, and then in Trust, to permit the Child or Children, or Issue, to receive the Profits; For the Residue of the Term will bear no Limitation over, in Default of Issue or Child, in Case there be any one in Being, no more than such a Limitation of the Term itself would be good; for this would be to revive and introduce all the Inconveniencies of a Perpetuity, which has been so long since exploded; and the Trust of a Term must be limited in the same Manner, as the Term itself will bear a Limitation.

But the Chancellor said, this being by Way of Covenant, no more passed out of him, than to serve the Uses expressed, and 'twas not a

5 July, J. G.
in Court.
An Annuity,
3c. limited
in Remain-
der. See
2 Vern. 38.
43, 59, 195,
668, 680.
1 Vern. 329.
2 Chanc.
c. 94.
1 Chan. 12.
R. 260, 411.
2 Chanc.
R. 66, 153.
1 Salk. 156.

Disposition of the Annuity itself, but only a Covenant to pay the 14 *l.* in such Manner: And since it was never divested out of Sir *James*, he would not on this Bill, by any Pretence of Equity, tear it out of him or his Executors, and so dismissed the Bill, though he did not at all dispute the Case, if it had been a Term, or the Trust of a Term, settled in such Manner, that the Remainder would not have been good; but here 'twas only a Covenant to pay the 14 *l.* and not the Annuity itself, which was thought by some at the Bar, to be an over-nice Distinction.

But this Decree seems to be reasonable, because the Administrator comes for a specifick Performance of the Covenant, and that he can't do, who was not originally in Contemplation, or intended to be provided for by the Covenant, but that the Term had actually been vested to these Uses; then the Interest of the Term being vested in the Child and the Heirs of his Body, as it must be, if the Settlement had been drawn according to the Covenant, then it must have gone to his Administrator.

Cassey against Beachfield.

Monday, Nov.
7, 1715,
J. G. in
Court.
Plaintiffs not
to be exam-
ined as
Witnesses.
Contra of
Defendants.

IN this Case 'twas said by Mr. *Vernon*, that the Reason you can't examine any of the Plaintiffs as Witnesses in the Cause is, because if the Cause miscarries, the Plaintiffs will be liable to Costs; and therefore their swearing is to exempt themselves; and 'tis their own Choice, that they are made Plaintiffs, for without their Consent, they could not have been made so; but the Defendants are forced into the Cause, and if their being made Parties should absolutely invalidate their Testimony, it would be in the Power of any one who had a Mind to oppress another, and deprive him of his Defence, to make the most material Witnesses Defendants in the Cause; and therefore any of the Defendants to a Suit, may be examined as a Witness, saving just Exceptions to their Credit, Capacity, &c.

*S. l. Proc. in Cha. 410.
2. Eq. Casabr. 190. pl. 5. 6. & next? in 3. P. W. 199. in note.*

Parker against Windham and others.

Wednesday,
Nov. 9, 1715,
J. G. in
Court.
How far a
Wife's For-
tune shall be
subject to the
Husband's
Administra-
tors or Cre-
ditors, &c.

THE only Question in this Case was, whether any, and what Part of the Wife's Fortune should be subject to answer the Plaintiffs Demand, who were Sisters and Heirs at Law, and also Administrators and Creditors of the Husband against the Defendant, who was Administrator of the Wife who survived her Husband; as to which, the Case was thus: Mrs. *Anne Asb* being entitled to the Sum of 5500 *l.* secured to her by a Mortgage for Years, on the Estate of Sir *Edward Bacon*, taken in the Name of Trustees; and likewise to 3000 *l.* secured to her by a Mortgage for Years, on the Estate of Sir *Humphrey Briggs*, taken in her own Name; and also to a Bond Debt of 400 *l.* and to several Jewels and other Things of considerable Value. The said Mrs. *Asb* became a Lunatick, and on a Commission of Lunacy, issued out of this Court for that Purpose, the Custody of her Person, and

and Estate was committed to one of the Defendants. Some Time after, *Philip Parker*, Esq; the Plaintiffs Brother, by some Contrivance, got the Lunatick, and married her, without making any Settlement or Provision; and for this Contempt, he and others concerned in procuring the Marriage, were committed by this Court. But the Marriage was sentenced in the Spiritual Court to be good; and that Sentence afterwards affirmed on an Appeal to the Delegates; and 'twas ordered at the same Time, that all the Deeds and Securities relating to the Lunatick's Fortune, should be brought before, and lodged with one of the Masters of this Court, in Order to secure a Provision for the Wife, in Case she should survive her Husband; and likewise for the Children of that Marriage, in Case there should be any.

Some Time after, on Mr. *Parker's* Application to the Court, by Petition, to supersede the Commission of Lunacy, and to have the Wife's Portion delivered to him, an Order was made the 19th of *March*, 1712, whereby the Commission of Lunacy was superseded; but in Regard of Mr. *Parker's* Estate was much incumbered, and he had made no Settlement on his Wife, 'twas at the same Time offered, that so much of the 5500 *l.* as was necessary, should be applied towards the disincumbering his Estate, and the Residue to be laid out in a Purchase of Lands, which, together with so much of Mr. *Parker's* Estate as would make up 500 *l.* per Ann. was to be settled on Mr. *Parker* for Life; Remainder to his Wife for Life, for her Jointure; Remainder to the Issue of that Marriage, &c. with a Remainder to Mr. *Parker's* right Heirs; and upon Mr. *Parker's* making such Settlement, the Residue of his Lady's Fortune was to be paid and delivered to him, and in the mean Time, he was to be examined on Interrogatories, touching the Incumbrances on his Estate. Mr. *Parker* never complied with any Part of this Order, but being indebted to one *Gooding*, in a considerable Sum, *Gooding* brings his Action against him, and recovers Judgment, and took out a *fieri facias*; and thereupon the Mortgage Term of Sir *Humphry*, was sold by the Sheriff, and the Debt paid. After this, Mr. *Parker* being indebted to the Plaintiff's Sisters, in about 2000 *l.* apiece, given them for their Portions, does, by Indenture taking Notice thereof, assign the said 5500 *l.* and all Securities, and also all the Fortune and Portion belonging to him in Right of his Wife, to Trustees in Trust: In the first Place, to pay thereout to the Plaintiffs their Portions, and after in Trust for himself, his Executors, Administrators and Assigns. Some Time after, Sir *Edward Bacon* paid in 5500 *l.* due on his Mortgage; and Mr. *Parker* having not comply'd with the Term of the last Order, the same was again placed out at Interest, on a Security taken in the Name of the Senior Master of this Court; after which, Mr. *Parker* died intestate, and without Issue; and about two Years after, Mrs. *Parker* died likewise intestate, and without Issue; whereupon the Plaintiffs, who were Sisters and Heirs at Law to Mr. *Parker*, and also Creditors, as above-mentioned, took out Letters of Administration to Mrs. *Parker* the Wife, and brought a Cross Bill, to have the Fortune and Securities delivered over to them; and for them, (being Plaintiffs in the Original Case) 'twas argued,

That

Argument
for the
Plaintiffs.

That they had an undoubted Right to this Fortune of the Wife, not only as Creditors, but also as they were Representatives and Heirs at Law to the Husband ; that if the Settlement had been made pursuant to the Order, the last Limitation being to the right Heirs of Mr. Parker, would have carried the Lands to them ; that though no Settlement were made, yet as Representatives to Mr. Parker, they were entitled to it ; so that call it *Land*, or call it *Money*, it equally belonged to the Plaintiffs ; that a *Chose* in Action belonging to the Wife, may be released by the Husband ; and if the Trustees for the Wife's Fortune, should pay it to the Husband, his Wife would be without Remedy ; that a Wife on her Marriage, is to forsake Father and Mother, and cleave to her Husband, and surely her Fortune is to go along with her ; that a Husband may maintain Trover for his Wife's Goods taken from her before Marriage, without joining her in the Action, so is 2 Lev. 107, &c. 1 Mod. 25. And if a Husband before Marriage, agrees to make a Settlement, and afterwards make a Settlement accordingly, this entitles him to all her Fortune, though 'twas standing out on the Bond, and other Securities, which would otherwise survive to the Wife ; for this Settlement makes him a Purchaser of his Wife's Fortune, especially if it were made in Consideration of that Fortune ; and therefore his Representatives shall go away with it, though the Wife survives ; and this had been several Times settled in this Court. And here, though no actual Settlement has been made, yet the Wife has had the Benefit of her Fortune preserved to her for Life, which is all she should have, if the Settlement had been made. That she being dead, and no Children to be provided for, her Fortune ought to go over to her Husband's Family, and not to her own. That though *Choses* in Action are not assignable, yet such Assignments are supported every Day in this Court ; and the Plaintiffs in this Case are Creditors, and therefore more strongly entitled to the Benefit of the Husband's Assignment. That the Security being lodged in the Court, makes no manner of Difference ; for the Court is but in Nature of a Trustee for them, *i. e.* for the Husband and the Wife ; she herself has no distinct Property therein ; but the Property is still in the Wife, and consequently in the Husband ; and a Deed made by *Cestuy que Trust*, is binding upon a Trustee in a Court of Equity, and even at Law ; if a Man brings Debt upon his Wife's Bond, and recovers Judgment, this alters the Nature of the Security, and makes it the Husband's ; and so it has been lately adjudged in the King's Bench, where such a Judgment was assignable within the Statute of Bankrupts, for the Benefit of the Husband's Creditors. For when the Husband recovers Judgment, the Debt is turned into *Rem Adjudicatam*, and is no longer a *Chose* in Action ; but my Lord Chancellor seemed to think, that such a Judgment would not have carried it to the Husband's Representatives against the Wife surviving, if that had been the Point of the Case.

It was likewise urged, that the Order of the 19th of March had not at all varied the Case, for the Intent of that was, only to secure some Provision for the Wife ; but she being now dead, that Order has had its Effect, and the Plaintiffs who stand in the Husband's Place, ought to have the Residue of the Wife's Fortune.

On the other Side 'twas argued, That by this Commission of Lunacy the Property of her Fortune was vested in the Crown ; and this Commission being in Force at the Time of the Marriage, prevented the Husband's Power over it ; that he had indeed been very justly committed for his Contempt in marrying her ; but that would be a very insignificant Punishment, if he might at the same Time go away with all her Fortune ; that at least the Crown had Power to preserve the Estates and Fortunes of Lunatics against any Disposition of their own, and that Power was lodged in this Court ; that the Court had more than a bare Custody of this Lady's Fortune ; that by the Order of *March 19, 1712*, Mr. *Parker* was not to have any Part of her Fortune 'till he made the Settlement thereby ordered ; that this was a Consideration in the Nature of a precedent Condition, and he not having performed his Part thereof, had no Title to the Fortune ; that the Husband's Assignment could not be presumed to affect the 3000*l.* on Sir *Humphry Brigg's* Mortgage, the Sheriff having made an absolute Sale of the legal Term on the *Fieri Facias* before that, and the Vendee by that Sale was become the absolute Owner thereof ; and Mr. *Vernon* cited a Case of *Burnell* against *Kinaston*, where a Wife having a Sum of 1400*l.* out on a Mortgage, the Husband after Marriage made an Assignment of this Money, and agreed when it was paid in, the Trustees should invest it in the Purchase of Lands to be settled to several Uses ; then the Husband dyed, and afterwards the Wife died before the Money was paid in ; and it was decreed for the Representatives of the Wife, the Reason of which Case he said was, that the Husband could not transfer to account more than he himself had ; that he had but a Power of calling in this Money ; but if he had made Use of that Power, and receiv'd it, the Property had been absolutely in him ; that his Assignee who stood in his Place could have no other Interest than the Husband himself had ; and since the Assignee had not reduced it into Possession during the Husband's Life, the Wife being Survivor, became entitled to it as a *Chose* in Action, and consequently it must go to her Representatives ; and this he said was a Case similar It was likewise urged, That if this Fortune should go to the Representatives of the Husband, it might have proved a very great Hardship on Mrs. *Parker*, for she might have married again, and have had Children, and they must have been left destitute of any Provision : That as to the Husband's Assignment, it was general ; and if such general Assignment should prevail, it would soon put an End to the Doctrine of Real Chattels and *Chose* in Action surviving to the Wife ; for then 'twould be only for the Husband, immediately after Marriage, to make a general Assignment of all his Wife's Fortune, and that would prevent her taking any Thing after his Death, though nothing more were done by the Husband to alter the Property ; that as the Plaintiffs could, with no Colour, have ask'd the Decree they are seeking for against the Wife herself, if she were living, no more ought they to prevail against the Defendant, who is her Representative, and stands in her Place. Mr. *Vernon* also cited the Case of *Pheasant* and *Pheasant*, where a Man married a City Orphan without the Leave of the Court of Orphans, and for this he was

Argument
for the De-
fendants.

committed and fined ; and that sometimes that Court has fined a Man in such a Case to the full Value of his Wife's Fortune, and yet that Court is of a much inferior Jurisdiction to this ; and though such Proceedings may be somewhat arbitrary, yet they have never been condemned nor prohibited, and therefore he submitted to the Court whether Mr. *Parker's* marrying this Lady, who was under the Care and Protection of this Court, without their Leave, was not such a Contempt as might amount to the Forfeiture of her Fortune : And 'twas urged by most of the Defendant's Council, that the Power of the Crown over Lunatics was such a Prerogative as vested their Fortunes in the Crown, though the Committee was accountable for the Profits to the Relations of the Lunatick, or the Lunatick himself if he recovered ; and if so, the Portion of the Wife was divested before the Marriage, and consequently the Husband had no Power to dispose of her Fortune ; but this was thought by several to be no Law, and the Court thought it of so little Weight, that no Answer was made to it.

Opinion of
the Court.

Lord Chancellor. As to the Marriage, that is out of the Case, having had its Agitation in a proper Court, and a Sentence pronounced upon it, and therefore it's to be look'd upon as valid and good : As to the Order of the 19th of *March*, I think likewise that's out of the Case, for as the Husband, if he had complied with the Terms of that Order, had been a Purchaser of his Wife's Fortune, so having not complied with it, it's now as if no such Order had been made : So on the other Hand, the Wife being now dead, and no Children left, the Reason of the Court's interposing is at an End, and then the 5500*l.* being paid in during the Coverture, was the Husband's Money, and the Property absolutely vested in him ; and though the Court thought fit to lay their Hands on it, and had Power so to do, being in the Master's Hands, yet that was only in the Nature of a Caution for his Wife, and it was the Husband's Money ; but the Court had a Power to detain and keep it from him 'till he made such Provision ; but the Wife being now dead, and no Children to be provided for, the Reason of their keeping the Money from him is at an End, and *equitas sequitur legem*, and must give it to the Husband's Representatives, to whom by Law it belongs : As to the 3000*l.* on Sir *Humphrey Bigg's* Mortgage, that being sold by the Sheriff on a *Fieri Facias* before the Husband's Assignment, it must take Place against the Assignment, though perhaps the Defendant may have an Equity to the Remainder after the Payment of *Goodwin's* Debt, for the Husband may assign over a Term or a Mortgage for Years which he has in Right of his Wife ; and so he may likewise the Trust of such a Term, and this shall prevail against the Wife, tho' she survive ; and this will be different from the Case of *Burnett* against *Kinaston* ; for in that Case the Mortgage to the Wife was a Mortgage in Fee, which the Husband alone could not dispose, and therefore the Estate being still in the Wife, carried the Money along with it to her Representatives ; but of a Term for Years, or the Trust of such a Term, the Husband hath absolute Power, and may dispose of it without his Wife's joining with him ; and therefore this Assignment of his might have been good if it had not been for the Antecedent

dent Sale by the Sheriff; but however, this Question is not now before me, and 'till you bring the Cause of *Goodwin's* Creditors I shall say nothing further in it; as to the Bond of 400 *l.* that I think was plainly a *Chose* in Action, and must go to the Defendants notwithstanding the Husband's Assignment, because it was a Thing not assignable at Law, and here seems no Equity to support it against the Defendant; but as to the Jewels they must go to the Plaintiffs, for this Court receives them only as a Pledge and Caution, and the Property was still in the Wife, and consequently in the Husband; and here was no Tort or tortious Act to divest that Property, and turn it to a *Chose* in Action, for the Possession of the Court is not such as will divest Properties, and therefore the Plaintiffs, who are Representatives of the Husband, have a Right to them likewise; and 'twas said the Difference between a Bond, and such like, and a Term for Years where the Husband was entitled in the Right of his Wife was, that the Bond, &c. was meerly a *Chose* in Action, and not assignable by Law; but a Term for Years was only a Chattel Real, which the Husband might assign without his Wife by Law; and so he might the Trust of such a Term, and consequently the Money secured upon it.

Dawley *versus* Ballfrey.

l. c. 1. 2. Wm 285.

A Legacy of 100 *l.* was devised to an Infant of about 10 Years of Age; the Executor paid the Legacy to the Father, and took his Receipt: When the Infant came of Age the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately; but however he would not have him trouble the Executor about it, for that he would give him 200 *l.* for it: Upon this the Son rested satisfied for about 14 or 15 Years, and he and his Father carried on a joint Trade together, and then became Bankrupts, and upon a Commission taken out against the Son, this Legacy of 100 *l.* was assigned, among other Things, for the Benefit of the Creditors; and the Plaintiff, the Assignee of this Commission, brought this Bill against the Creditors to have an Account and Payment of this Legacy.

For the Defendant 'twas insisted, that 'twould be a Hardship on him if he should be obliged to pay it over again, that he had already fairly and honestly paid it to the Father whilst he was in good Circumstances; and if Application had been made to the Defendant sooner, he might have had his Recompence over against the Father; that the Father was the natural Guardian of his Children, and such Payments to him have formerly been allowed good, 1 *Chan. Ca.* 245. tho' indeed the Court hath thought fit to extend their Care for such Children further, and disallowed such Payment: But from the Circumstance of this Case, 'twas hoped that the Defendant wou'd not be answerable for it.

My Lord Chancellor. If the Father had not made the Son such Promise, and the Son had required the Money in Time, the Case might have been more doubtful; but this Promise of the Father drew him in from applying to the Defendant sooner; and since the Father had

Saturday
12 Nov. 1715.
7 G. in Court.
A Legacy to
an Infant Son
paid by the
Executor to
the Father,
and after-
wards assign'd
by the Com-
missioners of
Bankrupts.

For the De-
fendant.

Opinion of
the Court.

had not, nor could not make good his Promise (being a Bankrupt likewise) the Reason of the Son's Forbearance was at an End; and he thought the Rule of this Court in not suffering Parents to receive their Childrens Legacies, was founded on very good Reasons; and therefore left this Case might be cited hereafter as a Precedent, when the Circumstances attending it were forgotten, and to discountenance and deter others from paying such Legacies to the Parents; though he did not deny the Hardship of this particular Case, he affirmed the former Decree against the Executor (this being upon a Rehearing)

Demary versus Metcalf.

Wednesday
16 Nov. 1715.
J.G. in Court.
Jewels worth
600 l. are
pawn'd for
200 l. The
Pawnee after
lends divers
other Sums
on the Pawn-
er's Notes.
No Redemp-
tion without
paying the
whole.

*Saintjohn
versus Hol-
ford.*

THIS was a Case wherein my Lord *Chancellor* took Time to consider, to be attended with Precedents; and it was shortly thus: A Man borrows 200 l. upon the Pawn of some Jewels worth about 600 l. and takes a Note from the Pawnbroker, acknowledging the Jewels to be in his Hands for the Security of 200 l. afterwards the Pawner borrows at several Times three several other Sums of Money of the Pawnee, and gives his Note for every Sum, without taking any Manner of Notice of the Jewels, and dies; and his Executors brought this Bill to redeem the Jewels on Payment of the 200 l. first lent thereon, and Interest: And the only Question was, Whether he should not likewise pay the other Sums secured by his Testator's Notes before he should be admitted to redeem; so the Plaintiffs were to produce Precedents that the Redemption might be on Payment of the first Sum, and Interest only, but cou'd not find any Precedents; and therefore my Lord *Chancellor* now gave his Opinion, that the Plaintiffs must pay all the Money due on the several Notes, and said, since there was no Precedents to guide him, he thought the constant Maxim of this Court sufficient for this Purpose, *viz. That he who would have Equity, or comes here for Equity, must do Equity*; and since the Plaintiff can't have back these Jewels without the Assistance of this Court, 'tis reasonable and just he should pay the Defendant all the Money due to him, for 'tis to be suppos'd the Pawnee would not have lent him those Sums but on the Credit of the Pledge he had in his Hands, and said the nearest Case he cou'd find that came to this was the Case of *Saintjohn versus Holford*, 1 *Chan. Ca.* 97. though he agreed that Case might be distinguished from this, being between the Heirs of the Mortgagor and Sureties; and tho' (he said) the Reasons he now gave for his Opinion are not mentioned in that Case as the Reasons of that Resolution, yet the Case would very well admit them, and he now decreed accordingly: But Mr. *Vernon* said, that if there had been any Creditors of the Pawner by Bond, or a Commission of Bankruptcy out against him, the Defendant must have come behind then for his Debts on the several Notes, and could not have tacked them to the Pawn, so as to prefer himself before them; but that not being the present Case, my Lord decreed, that if the Plaintiff would redeem (the Time for Payment being lapsed) he must pay all; and so as I was informed, he had declared

declared his Opinion, that if the first Sum had been secured by a Mortgage of Lands, he should not have been admitted to redeem after the Day of Payment was lapsed, without paying likewise all that was due to the Mortgagee on Notes, or Simple Contracts; otherwise if such subsequent Debts had been secured by Bond.

Seale versus Seale.

IN this Case, a Man being seized of a good Real Estate, and also possess'd of a considerable Personal Estate, and having an Intention to settle and secure both in his Name, does by his Will in Writing, after several Legacies and Bequests, give and devise all the rest and Residue of his Real and Personal Estate to the Plaintiff, and the Heirs Male of his Body, to be begotten for ever; and for Want of such Issue, to the Defendant and the Heirs Male of his Body, to be begotten for ever; with like Remainder over to several other of his Name, and makes the Defendant his Executor and dies; and now this Bill was brought to have an Account of the Personal Estate, and that the Plaintiff might enjoy the same to his own Use absolutely, the Remainder over being void, and the Defendant brought a Cross Bill, upon Pretence that there were Directions in the Will, to have the whole Personal Estate invested in the Purchase of Lands, to be settled in the Manner abovementioned; but upon reading of the Will, my Lord Chancellor was clear of Opinion, that those Directions tended only to such Part of the Personal Estate, as was out upon Government Securities, (which was about 8 or 9000 *l.*) and for the Residue, (which amounted to about 14 or 1500 *l.*) that was plainly taken no other Notice of, than in the Devise abovementioned, of all the rest and Residue of the Real and Personal Estate.

And for the Plaintiff, 'twas said, that the Devises over were absolutely void, and the whole vested in the Plaintiff as not capable of bearing any further Limitation, and this Point the Defendant's Council gave up.

But then they insisted, that the Intent of the Testator appearing to be to continue the Real Estate, and the Lands to be purchased, in the Name of the Testator, this Court would order, that the Settlement should be made in such Manner, that the Plaintiffs might not have Power to defeat the Remainder; therefore that the Plaintiff should be made but Tenant for Life, with Remainder to his first and other Sons in Tail Male, and so for the others in Remainder. And the Attorney General said, the House of Lords had lately made the like Provision for the Benefit of the Issue, that they might not be defeated by the Father. But my Lord Chancellor said, that was in a Case of Marriage Articles, where the Intent was plainly to provide for the Issue of the Marriage; but here the Testator has expressly given it to the Plaintiff, and therefore he thought this Court could not vary the Limitation; besides that, the Defendant has here a Chance for the Remainder, if the Plaintiff should die without Issue, before any Recovery suffered; and

E e

mentioned

A Devise of Personal Things in Remainder void. But a Devise of Money to be laid out, &c. may be good in Tail, &c. Q.

mentioned a Case where such a Remainder took Place, by the Death of the Tenant in Tail without Issue, before he could compleat a Recovery, and therefore ordered the Settlement in this Case to be made in the like Manner, and the Deeds and Writings to be brought before the Master for that Purpose.

Howel versus Price.

Friday Nov.
18, 1715.
A. mortgages
Lands by
Lease and
Release, to be
void, &c.
on Payment
of Money;
but no Cove-
nant for the
Payment.
And then
settles and
devises the
Lands to his
Wife and
Daughter,
&c.

ONE *Davis* made a Mortgage of Lands in *Wales*, by Way of Lease and Release, to one *Reynolds* and his Heirs, in Consideration of 300 *l.* and the Proviso was, that if the Devisor his Heirs or Assigns should on *Michaelmas* 1702, or at any *Michaelmas* following, pay to *Reynolds* his Heirs or Assigns, the Sum of 300 *l.* and all Arrears of Rent and Interest, which should be then due, then the said Conveyance was to cease. But in this Conveyance was no Covenant for Payment of the Money as usual, but only Covenants for quiet Enjoyment; and that the Estate was free from Incumbrance. *Davis* pays the Interest of this Money during his Life, and settles the Lands to the Use of himself, Remainder to *Mary* his intended Wife for her Jointure, Remainder to his own right Heirs; after which, having Issue by his Wife one only Daughter named *Maud*, he by his Will gives several Legacies, and afterwards devises in these Words, *all the Rest and Residue of my Personal Estate, I give and devise to my Wife Mary, and my Daughter Maud, who I make also Joint Executrixes, as well to pay my Debts as levy my Debts*, and dies. *Maud* the Daughter was then an Infant, and died soon after, under Age, and without Issue: And now this Bill was brought by the Plaintiff and his Wife, who was Heir at Law to *Davis*, against *Mary* his Widow and Executrix, and against the Assignee of the Mortgage, to be let into a Redemption of the Estate, and to apply the Personal Estate in the Hands of the Widow and Executrix in Aid and Exoneration of the Real Estate, for the Benefit of the Plaintiff the Heir at Law.

But the Lord Chancellor thought this a quite different Case from those, wherein such Directions had been given, and said, that there being no Contracts for Payment of the Money, there was no Contract at all between them, neither express nor implied, nor could any Action lye against the Mortgagor, to subject his Person, or to compel him to pay this Money; but that this was in the Nature of a conditional Purchase, subject to be defeated on Payment by the Mortgagor, or his Heirs, of the Sums stipulated between them at any *Michaelmas* Day, at the Election of the Mortgagor or his Heirs; so that here was an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, which would not be forfeited at Law like other Mortgages; and therefore this could be no Equity of Redemption, or any Occasion of the Assistance of this Court, but that the Plaintiffs might even at Law defeat the Conveyance by performing the Terms and Conditions of it, which were not limited to any particular Time, but might be performed at any *Michaelmas* Day, to the End of the World.

And

And since there was no Covenant, no Contract either express or implied, to charge the Personal Estate of the Mortgagor, he thought there was no Reason to lay the Load of the Debt upon that which was given to other Persons; and though *Maud* which was Joint Executrix with the Defendant, was also Heir at Law to the Mortgagor, yet he did not think her Moiety of the Personal Estate, ought to be employed towards disincumbering this Estate; but it must go to the Defendant, as the surviving Residuary Legatee; and for the Expression in the Will, concerning the Payment of his Debts, that being coupled with the other Words, *who I make Joint Executrices, as well to pay my Debts as to levy my Debts*, shews that he meant such Debts only, as belonged to the Office of an Executor, which this did not, there being no Remedy against them for want of a Covenant for that Purpose; and it was at the Election of the Heirs of the Mortgagor for ever, whether they would redeem this Estate or not. But he agreed, if a Redemption were now to be of it, the Defendant having the Estate for Jointure during her Life, must pay one Third, and the Plaintiff the Heir at Law must pay the other two Thirds of the principal Money; and that the Defendant in the mean Time must keep down the Interest; but there being some other Points in the Case, which required a further Discussion, and might be properly tryable at Law, my Lord made no Decree, but ordered them to search for Precedents, and 'twas said to be a common Note. Practice in *Wales*, to make Mortgages in this Manner, with Design to keep the Estate for ever in their Family.

White & Ux', versus Thornborough & Ap.

ISAAC JACKSON the Plaintiff *Mary's* Father, being seized in Fee of a Freehold Estate, and also of a Copyhold Estate, having married an Orphan of the City of *London*, does, after Marriage, (in Consideration of 1700 *l.* which was her Portion, and was but then paid him) by Indenture 1 *October*, 1673, covenant with the Chamberlain of the City of *London*, and other Persons, to levy a Fine of the Freehold Estate to the Use of himself for Life; Remainder to the Issue of *Mary* his Wife for her Life for her Jointure; Remainder to the Heirs Male of his Body, and the Body of the same *Mary* to be begotten, with Remainder to his own right Heirs; and by the same Indenture, covenants to surrender the Copyhold to the same Uses; the Copyhold was not surrendered, nor was any Fine levied of the Freehold. After this he had Issue by his said Wife, *Abraham* his only Son, and *Mary* his only Daughter, and Wife of the now Plaintiff, and died; after his Death, *Mary* his now Widow brought a Bill, and had a Decree to hold the Estate during her Life. *Abraham* the Son contracted Debts to the Value of 1400 *l.* for which the Defendants became Securities; and for better securing the Payment of those Debts, *Abraham* does by Indenture in *August* 1714, covenant to levy a Fine of his Freehold Estate to the Use of *Mary* his Mother, who was then living, for Life; Remainder to the Defendants for 500 Years; Remainder to himself in Fee.

Saturday
Nov. 19,
1715, J. G.
in Court.
An Orphan's
Marriage
Portion paid,
but no Settlement
pursuant to Agreement
after the Death
of the Husband
and Wife.
A Settlement
decreed for
the Daughter,
&c.
But note a
Difference,
as to Copy-
hold and
Freehold.

Decree
appealed
from.

For the
Plaintiffs.

Covenant to
levy a Fine,
is in Equity,
to be taken
as a Fine
levied.

Fee ; and the Trust of the Term was declared to be for the Payment of the 1400*l.* and Interest, with a Covenant for further Assurance ; and at the same Time *Abraham* surrenders his Copyhold Lands to the same Uses. After this, *Abraham* makes his Will, and devises all his Freehold and Copyhold Lands for the Defendants, for the better indemnifying them against the said 1400*l.* and Interest, and makes them Executors, and then goes a Voyage to the *East-Indies*, where he died without Issue, leaving the Defendant *Anne* his Widow and Relict ; but no Fine was ever levied by him of the Freehold Estate, pursuant to the same Indenture ; and now *Mary*, the Plaintiffs Mother being dead, the Plaintiffs brought their Bills for a Discovery of the Writings, and an Account of the Rents and Profits of the Real Estate, as belonging to the Plaintiff *Mary* ; and that the Defendants might be likewise obliged to surrender back the Copyhold Estate to her : And my Lord Chancellor *Harcourt* decreed accordingly for the Plaintiffs, saving only to the Defendant *Anne* Dower out of the Freehold Estate ; and the Reason of this Decree was, that he took the first Indenture only to be in the Nature of Articles for a Settlement ; and that if a Bill had been brought to have carried it into Execution, the Settlement would have been so, as to have made both the Son and Daughters Purchasors of the respective Rents ; and as to the Copyhold, that being entailed by the Articles, would not afterwards by a bare Surrender be defeated, without a particular Custom had been found to have warranted it ; and from this Decree, the Defendants have now appealed.

And for the Plaintiffs 'twas argued, that they were Purchasors under the first Settlement, made by the Father, in Consideration of 1700*l.* paid ; that though this Deed was executed after Marriage, yet the Portion being paid at the same Time, it would not be looked upon to be voluntary, but would be as effectual as a Settlement before Marriage ; and so it had always been held, where the Portion was paid at the Time of making the Settlement. That if the Fine had been levied, pursuant to the Deed of Covenant, there had been no Question but it had been an effectual Settlement ; and then *Abraham* the Son being Tenant in Tail, his Covenant to levy a Fine, could not have bound his Issue, much less the Plaintiff *Mary*, who claimed as a Purchasor by Way of Remainder, as Heir of the Body of her Father ; that though no Fine was levied, yet in a Court of Equity it was to be looked on as if there were ; and there is no Doubt, but if a Bill had been brought by the Trustees in the Father's Life-time, the Court would have obliged him to compleat the Settlement, by levying the Fine : That the Plaintiff *Mary* was a Purchasor for valuable Consideration under this Settlement, and therefore ought not to lose the Benefit of it. That as to the Copyhold Estate, that was actually surrendered by the Uses of the Deed ; and then *Abraham* being Tenant in Tail thereof, could not, without a particular Custom for that Purpose, defeat either his Issue or the Plaintiffs, by a bare Surrender ; and therefore 'twas prayed the former Decree might stand.

On the other Side 'twas argued, that the Defendants were just Creditors for 1400 l. that if this Estate was taken from them, they might entirely lose their Debts; that the Fine being levied, pursuant to the first Deed, the Legal Estate continued still in the Father, and from him descended to *Abraham* his Son, and he had by his Will devised it to the Defendants; that it was very extraordinary for the Plaintiffs to ask the Assistance of a Court of Equity to take it from them; that *Abraham* the Son was but Tenant in Tail in Equity, and therefore, though he did not levy a Fine, yet that was not material; for a Bargain and Sale, a Feoffment or Covenant, to levy a Fine by such an equitable Tenant, has been held sufficient to bind his Issue; and so it was settled in the Case of *Alee* against *Alee*, where that Point came solemnly in Debate; that though the Plaintiff claimed by Way of Remainder, as Heir of the Body of her Father, yet 'twas held such a Remainder, as was actually vested in the Son, and if the Settlement had been prosecuted, he might by his Fine, have barred not only his own Issue, but also the Plaintiff; and then his Covenant to levy a Fine ought in Equity, to have the same Effect. That as to the Copyhold Estate, there could be no Entail of a Copyhold; or if there could, yet a bare Surrender by such Tenant in Tail has been always held sufficient to bind his Issue, unless some particular Custom were found, that a common Recovery were needful; and therefore 'twas prayed that the Decree might be revers'd.

For the
Defendants:

But my Lord Chancellor said, he thought these Deeds of Covenant were to be looked upon only in the Nature of Articles; and then if a Bill had been brought to carry it into Execution in the Life-time of the Father, the Court would have decreed the Limitation to have been to the first Son of the Heirs Male of his Body, with Remainder to the Daughters, and the Heirs of their Bodies begotten; and the Remainder to the Heirs of the Body of the Father, being manifestly to let in the Issue Female; and in such Case, though the Son by a common Recovery might have barred the Remainder to the Daughters, yet they would have a Chance for it, in Case no such Recovery had been; which proves the Reasonableness of pursuing strictly the Intent of such Agreement, by ordering the Settlement to be actually made accordingly, and not to vest it in the Son in Fee; for a Tenant in Tail, through Ignorance or Forgetfulness, may omit to suffer such a Recovery, or he may be prevented by Death, before he has compleated it, and then the Remainder will take Place; but he thought in this Case, from the Circumstances of paying the Portion at the same Time, and the Chamberlain of *London* being a Party, that it was more than Articles, and ought to be looked upon as a Settlement, though he said, 'twas a very infirm and imperfect one; but taking it as a Settlement, then by the Limitations thereof, as they now stand, though the Son would have both Estates in him, and might have barred them by a Fine; yet this Covenant to levy a Fine only, can't affect the Plaintiff, who now derives her Title, not under the Son, but as Heir of the Body of her Father: And so she is in *Paramount* the Estate in Tail Male which the Son took: But as to the Copyhold Estate, that could not be looked upon

Curia.]

Copyholds.

as a Fee Simple conditional, (which the Council for the Plaintiff contended for) not being able to support it as an Entail; (and that the Son could not alien it before the Condition performed, by having of Issue) but my Lord said, this could not be imported by no Means; for that every Body knew Copyholds were at first but a kind of Tenure in Villenage, and in Respect of their base Nature, were determinable at the Will of the Lord; though now indeed, they have been supported and hardened by Time; but *prima facie*, it must be taken, that a Surrender by such Tenant in Tail, will bind his Issue without a particular Custom was found, that there ought to have been a common Recovery, and that not appearing in the Case, he thought the Defendants had a good Title to the Copyhold, and therefore reversed the former Decree, as to the Freehold, and thought the Defendants having the Estate in Law in them by the Devise, and being just Creditors, ought not to have this Estate taken from them, by the Assistance of a Court of Equity, and thought the Distinction of an *infirm Settlement* unintelligible. *Note*, in this Case, the Defendants themselves had by their Answer, plainly confess'd, that they had Notice of the first Deed, at the Time they became Securities, and took the Covenant to levy the Fine.

Thomas versus Terry.

A Mortgage, without any Covenant, to repay the Principal, &c.

A Man borrows a Sum of Money on the Mortgage of a Ship, and covenants, that whatever Money the Mortgagee should advance for the Insurance of the Ship in a Voyage she was then about to make, that he would repay it; but there was no Covenant for the Repayment of the principal Money itself. The Mortgagee insures the Ship, and the Mortgagor repaid him that Money. Then the Ship proceeds on her Voyage, and returns home; and being afterwards to go out again, on another Voyage, the Mortgagee treated with a Person concerning the Insurance thereof, but could not agree for the Rate; and thereupon the Ship went out, and was lost in the Voyage: And now between the Mortgagee and the Mortgagor's Executors, the Question was, whether the Mortgagee should come in for his principal Money as a Creditor by Simple Contract.

And 'twas argued, that he ought not; because there was no Covenant for Payment of the Mortgage Money; so that he must be supposed to rest himself on the Ship only for the Security, and that being lost, so is his Money too: But on the other Side, 'twas argued by Mr. *Vernon*, that if he had taken no Security at all, he had then without Question been a Creditor on Simple Contract, and surely the taking Security, ought not to put him in a worse Condition, especially now that the Security being lost, his Debt rests wholly on the Simple Contract; and my Lord Chancellor *Harcourt* was of the same Opinion, and pronounc'd his Decree accordingly.

Trott *versus* Vernon.

A Man being seized of a Real Estate, and also possess'd of a Personal Estate, makes his Will in Writing, and thereby devises by these Words: *Imprimis, I devise all my Debts, Legacies and Funerals shall be paid and satisfied in the first Place. Item, I will and devise,* and then proceeds to dispose of his Real and Personal Estate; and now his Personal Estate not being sufficient, the Question was, whether that Clause in this Will should amount to a Charge of the Real Estate for the Payment of his Debts, Legacies and Funerals? And my Lord Chancellor Cowper was clear of Opinion it should; for as to his Debts, 'twas but natural Justice they should be paid; and his Personal Estate should have been liable to the Payment thereof, whether he had given any Directions about them in his Will or not: When therefore he wills and devises that his *Debts, Legacies and Funerals shall be paid and satisfied in the first Place*, these Words must be intended to give a Preference for those Purposes to any other whatsoever; and since he does not devise his Real or Personal Estate to any Person in particular for those Purposes, the Persons who come within that Description, must be supposed to be in his View; and it must be taken as a Devise for the Benefit of Legatees and Creditors, preferable to any Disposition whatsoever, either of his Real or Personal Estate, and consequently both of them are made liable thereto.

What Words in a Will shall, by Implication, bind the Real Estate to pay Debts and Legacies.

Pagett *versus* Hoskins.

Peter Whitcombe being a Freeman of London, and having Issue two Daughters only by a former Venter, makes his Will, and devises thereby 6000 *l.* apiece to his two Daughters, makes his second Wife Executrix and dies; the Widow after his Death, proves his Will, and on a Treaty of Marriage to be had between her and Sir Bennet Hoskins, she gives in an Estimate of Mr. Whitcombe's Personal Estate, amounting to about 18000 *l.* whereof 6000 being her own Share, she had taken Tallies and Orders to that Value in her own Hands, and produces them, in order to have a Settlement made on her by Sir Bennet Hoskins, adequate to that Value. Thereupon by Articles reciting a Marriage intended to be had between her and Sir Bennet Hoskins, and that 'twas computed her Fortune, upon the Account, would come out to be 6000 *l.* Sir Bennet, in Consideration thereof, agrees to settle upon her by Way of Jointure, 600 *l.* per Ann. for Life; and that she at the same Time makes an Assignment of the Dower she was entitled to, out of Mr. Whitcombe's Real Estate, to Trustees in Trust, to make good any Loss or Deficiency that might happen in the assigning of her 600 *l.* Fortune. The Marriage takes Effect, and Sir Bennet receiving the 6000 *l.* settles 600 *l.* per Ann. on his said Wife for Life, pursuant to the Articles; And it happening afterwards, that a Loss of 12000 *l.* really befel Mr. Whitcombe's Personal Estate, this Bill was now brought by the Daughters,

Wednesday,
Feb. 9, 1715;
J. G. in
Court.

Notice.

ters, after the Death of my Lady *Hoskins*, and Sir *Bennet*, who survived her, against the Plaintiff, who had taken out Letters of Administration to Sir *Bennet*, for an Account of his Personal Estate, and to have a proportionable Recompence thereout, for their Shares of the 6000 *l.* that being now, as the Case fell out, all the Personal Estate Mr. *Whitcombe* had left; and 'twas decreed accordingly by my Lord *Harcourt*, on a general Account: But afterwards, on a Rehearing, his Lordship varied that Decree, and directed an Account of the Personal Estate, (exclusive of the 6000 *l.*) from which Decree, the Plaintiffs now appealing to my Lord Chancellor *Cowper*, 'twas insisted on for the Plaintiffs, that they ought to have an Account of the Personal Estate at large; that if they should not have this Account, they would be entirely defeated of their Portions; that this 6000 *l.* was all that was left, and Sir *Bennet* having Notice that it was subject to an Account, ought to be affected with it, especially as the Case is, where he has provided himself of a Recompence, in Case of a Loss or Insufficiency; that otherwise, it would be in the Power of any Woman who was Executrix, to give away all her Testator's Assets with herself in Marriage, and so defeat such Creditors of their Debts; the Consequence whereof would be, that none from henceforth, would run the Hazard, and so no Woman could be made Executrix. And though Sir *Bennet* is in the Nature of a Purchaser of this 6000 *l.* by his Settlement, yet he appears to be a Purchaser, with full Notice; and therefore his Assets ought to be liable to the Plaintiffs Satisfaction; and cited 2 *Vent.* 360. *Hodges versus Wadinton.*

On the other Side, 'twas argued by Mr. *Vernon* and others; that if an Executrix commit a Devastavit and marries, the Husband shall be liable at Law, even during the Coverture, to make it good; but after her Death, no Suit can be maintained against him at Law, whatever Fortune he had with her; that in Equity it has been held, that any specifick Assets of the Wife's Testators may be followed in the Hands of her Husband, after her Death; so for any Thing he has merely in Right of his Wife, he shall be liable in this Court, so far as that extends, to make good any Devastavit committed by his Wife: But for the Fortune at large of the Wife's, 'twas never carried so far, as to charge the Husband on Account thereof after her Death; especially where the Husband, as in this Case, was a Purchaser of his Wife's Fortune for a valuable Consideration, by making a Settlement on her; that if the Wife before Marriage, had sold those Tallies and Orders to a Stranger, and wasted the Money, the Plaintiff could never have come against the Purchaser for a Recompence; that the Husband was equally a Purchaser in this Case, and ought not to be affected with the accidental Loss, which has since happened in Mr. *Whitcombe's* Assets; that if it should be otherwise, there would be no dealing with an Executrix; and where a Woman was made Executrix, she must never expect to marry. But my Lord Chancellor said, that Sir *Bennet Hoskins* taking Notice in the very Articles, that the 6000 *l.* was Part of her first Husband's Personal Estate, and that too upon Account, open and unliquidated, he came in as a Purchaser thereof, subject and liable to the

the Terms of the Purchase, and can be entitled to it no other Way. He does not take it as a stated liquidated Sum, whereto his Wife was entitled; but as so much, which upon the Account might be coming to her; and therefore takes it subject to the Event of the Account, and has accordingly provided himself a Recompence, in Case it should fall out to be less; and therefore he thought the second Decree, which excluded the 6000*l.* was wrong, and that the first Decree was right, and ought to stand; but Mr. *Vernon* seemed to be very much dissatisfied with the Decree, and apprehended the Consequence might be very dangerous to Persons who should deal with Executrixes for Purchase of their Testators Assets. But my Lord Chancellor said, that Inference could not be made in this Decree, which was founded wholly upon the Circumstances of the Case.

Note, Mr. *Talbot* told me he remembered a Case, when the now Chancellor had the Seals before, where an Executor being possessed of a Term for Years, in Right of his Testator, and being indebted to one in a Sum of Money on his own Account, agreed with his Creditor for the Sale of his Term, and that the Debt should be discounted out of the Purchase Money; yet upon a Bill brought against him by the Creditors of the Testator, he was not allowed to sink his own Debt, and was decreed to pay the Money, because he purchased with *full Notice*. That this was a Testamentary Estate, and nothing came into the Executors Hands as an Equivalent for it, to make up the Quantum of his Testator's Assets; and he thought the principal Case here very much resembled that, because, though Sir *Bennet* be a Purchasor, yet with Regard to the Plaintiffs who have Demands out of this 6000*l.* the 600*l.* *per Ann.* settled in Consideration thereof on the Wife for her Jointure, does not come into her Hands as an Adequate Recompence, or Consideration for the 6000*l.* which she has parted with, and said he was much satisfied with the Reason of the Decree in the other Case, and thought the principal Case not unlike it.

Purchasors with Notice, are bound in Equity, to pay Debts, &c.

Burton versus Hastings.

ON a Treaty of Marriage, Articles were entered into, for settling of the Lands in Question to the Husband for Life; Remainder to the Wife for Life; Remainder to Trustees, to preserve contingent Remainders, with Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, with other Remainders over; the Marriage took Effect, and a Settlement was made to the Husband and Wife successively for Life; Remainder to Trustees, to preserve contingent Remainders; Remainder to the first Son of that Marriage, and the Heirs of the Body of such first Son; and so to the second and other Sons of that Marriage in like Manner, with a Remainder to the Heirs of the Body of the Wife, *by her said Husband*. They had Issue one Daughter only, then the Husband died, and the Wife married a second Husband, and they both joined in a Fine and Recovery, by which the Daughter being at Law divested of her Inheritance, brought this Bill to carry the Articles

Marriage Articles. A Remainder. A Remainder to the Issue. But the Settlement is a Remainder in Tail to the Wife.

into Execution ; for that by the Settlement, Care was taken of the Sons, pursuant to the Intent of the Articles, but no Care was taken of the Daughters, in Regard the Limitation to the Heirs of the Body of the Mother, by the first Husband, made her Tenant in Tail general, and consequently at Liberty to defeat her Daughters, as she has now done by this Fine and Recovery, which was contrary to the Intent of the Articles, which were to make an effectual Provision for all the Issue of that Marriage.

But my Lord Chancellor said, if no Settlement had been made, and they had then come hither to have enforced the making of one pursuant to the Articles, there this Court would have taken Care the Daughters should have been likewise secured of the Provision intended by the Articles, by limiting a Remainder to the Daughters, and the Heirs of their Bodies to be begotten, on failure of Sons ; but here a Settlement being actually made, and accepted by the Parties, though a Provision be for the Sons stricter than the Articles themselves imported ; yet the next Remainder being limited in the very Terms of the Articles, he could now make no Alteration in it ; though Mr. *Vernon* offered a Difference, where a Settlement was made before Marriage, and where after. That where it was before, this Court could not interpose, as they could, where 'twas after Marriage ; yet the Court had no Regard to this Distinction, but too hastily dismiss'd the Bill.

Nandike versus Wilkes.

Friday, May
4, 1716,
J. G. in
Court.
The Condi-
tion of a
Bond on a
Marriage
Treaty de-
creed for se-
curing the
Issue.

ON a Treaty of Marriage between the Defendant and the Plaintiff *Joanna*, the Defendant entered into a Bond to the Plaintiff *Joseph*, Father of the Plaintiff *Joanna*, with Condition, to surrender certain Copyhold Lands to the Use of himself for Life ; Remainder to the Plaintiff *Joanna* for Life ; Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Husband. The Marriage took Effect, and now this Bill was brought against the Husband, to compel a Surrender, pursuant to the Intent of this Bond ; and the Husband making Default at the Hearing, it was decreed, that a Surrender should be made to the Use of himself for Life ; Remainder to the Use of the first and other Sons in Tail General, with a Remainder to the Daughters of their two Bodies, to be begotten in Tail General ; and that in the mean Time, 'till such Surrender was made, the Court declared, that the Copyhold Lands should be held and enjoyed according to these Uses. *Note*, this Decree was on a Bond, where, though the Penalty seems to have been the only Sanction intended, for securing the Performance of the Condition ; yet a specifick Execution was decreed, and in such a Manner too, as effectually to secure the Issue from being defeated by making them Purchasers.

Simpson

Simpson *versus* Hornby. *Vide Post.* 33.

THE Question in this Case arose upon the Will of one Mr. Addison, who having a Wife and only two Daughters, devised Lands in several Towns to his Wife for Life, for her Jointure; and afterwards, towards the Close of his Will, devises all his Lands, Tenements and Hereditaments, after the Death of his dear Wife, to his Daughter Bridget, and the Heirs Male of her Body; and for want of such Issue, to his Daughter Jane, (who was his Eldest, but had disoblged him by marrying improvidently) and her Assigns, during her natural Life, and after her Death, to her first and other Sons in Tail Male successively, with several Remainders over. Bridget dies in her Father's Life-time, leaving Issue a Son, whom the Grandfather took into his own House, and expressed much Kindness for him. Afterwards the Grandfather adds a Codicil, which begun thus: *A Codicil to be annex'd to my Will*; and by that, he gave some Part of a Leasehold Estate, which by his Will was given to his Daughter Bridget, to her Son, adds another Trustee for some Charities he had given by his Will, and duly executed this Codicil; but the Codicil was not actually annexed to his Will, so that the Execution of that could not amount to a Republication of the Will; and now the Questions were,

October 19,
1716, J. G.
in Court.
Of Devises
by Implica-
tion to a
Son, Daugh-
ter or
Grandson.

First, Whether the Wife took an Estate for Life, in the Lands remaining undisposed of by Implication.

Secondly, Whether the Son of Bridget could take at all.

As to the first Point, the Court seemed pretty clear, that the Wife took no Estate for Life by Implication, because the Implication, which shall disinherit an Heir at Law, must be necessary; and here is no necessary Implication, though the Daughters were Heirs; because it may be intended only of those Lands which were before expressly devised to the Wife for Life; so that they could not have them 'till after her Death; but for the others, they could have them immediately; and therefore the Will shall be taken distributively, according to the Case of *Cook versus Gerrard*, 1 *Saund.* 108. 1 *Lev.* 212.

As to the second Point, 'twas argued, that the Son of Bridget cou'd take nothing in this Case; that as in the Case of *Brett and Bridgdam*, the Words Heir of the Body, were only to express the Quality of the Estate; likewise, that as in one Case, the Devisee was intended to take a Fee Simple, so in this Case, the Devisee was intended to take a Fee Tail; and in either Case, the Words *Heirs* or *Heirs Male of the Body*, are a Description or Designation of the Person who was to take by Purchase; that as in the Case of such a Devise in Fee, the first taker might immediately dispose and give it away from his Heirs; so might the Devisee in this Case too, by proper Conveyances. That this Point has been long since settled in *Hartop's Case*, in *Cro. Eliz.* 243. and in *Fuller and Fuller's Case* the same, *Cook* 243. That this was held clear likewise in my Lord *Lansdown's Case*, lately in the *King's Bench*, where my Lord of *Bath* devised Lands to *Bernard Granville*, and the

Heirs

Heirs Male of his Body; and *Bernard* dying in the Life-time of the Testator, my Lord of *Bath* afterwards made a Codicil, and the Will and Codicil lying both together on the Table, my Lord took up the Codicil, and said, *this is my Will*, and then published it, and executed it in the Presence of three Witnesses, and when he had done, put both the Will and Codicil together in a Box; and yet, in that Case 'twas held, that the making the Codicil was no Republication of the Will being not affixed together; and then the Heirs Male of the Body of *Granville* could not take; no more can they in this Case, without admitting the making such Codicil might amount to a Republication; yet while the Words of the Will continued as they were, the Heirs Male of the Body, could take no more than a Grandson could take as Son by such Republication, according to the Case of *Stead and Bernard*, 1 Vent. 341. 2 Mod. 213, &c. That a Codicil was distinct Instrument of itself, and if the making of that should amount to a Republication of the Will, it would entirely elude the Statute of Frauds and Perjuries; that in my Lord *Lansdown's* Case, indeed, upon the Importunity of great Council, a Special Verdict was order'd to be found, though the Court was clear of their Opinions as to the Points, and that was afterwards agreed by the Parties; that in 2 Sid. 53, 78, 79, a like Devise to four Daughters was held void for a fourth Part, by the Death of one of the Daughters in the Life-time of the Testator; and so likewise was the Case of *Popham* against *Bamfield* in this Court. And my Lord Chancellor was clear of Opinion, that the Codicil in this Case could not help them; but he said, the Construction of Law in these Cases, was extremely rigid and severe; that the Testator in this Case, must certainly mean, that *Jane* should have nothing whilst there remained any Issue Male of *Bridget*; that the Words, *and for want of such Issue*, were not to be taken as Words of Course, but carried a plain Intention to give it to the Issue Male of *Bridget*; that he would consider of the Will, and if any Thing could be found to distinguish this Case from those that have been cited, he would give Relief for a Moiety, but if not, the Cases were so strong, that he must submit to be bound by them, and afterwards gave his Decree accordingly.

Brown versus Barkham.

SIR Edward Barkham being seized in Fee of the Lands in Question, by his Will, dated the 19th of Jan. 1700, devises all his Estate to Sir Edward Massingberd and Dymark Walpole, and their Heirs in Trust, to sell the same, or so much as would be sufficient to pay his Debts and Legacies; and after Payment thereof, directed the said Trustees to convey the Residue of his Estate to his Cousin Robert Barkham, and the Heirs Male of his Body; and for want of such Heirs Male, to the Heirs Male of the Body of Sir Robert Barkham, his Great Grandfather; and for want of such Heirs Male, to his own right Heirs for ever; and gave to his Sister Mrs. Newcomen 2000 l. to be put out at Interest by his Trustees, during her Life, and after her Death, to be paid

to b. verb.
J. L. Sec. in Chanc. 442. & 461.
Tuesday Nov.
6, 1716,
J. G. in
Court.
Of Devises
in Trust.
Post 131. &
1. Stra. 35.

paid to her eldest Son; and if she had no Son, then 1000 l. to go to her Executors or Administrators, and the other 1000 l. to go to his said Cousin Robert Barkham, or his Heirs Male; and after some Legacies, all the Residue of his Personal Estate to the said Robert Barkham, and made him his sole Executor; but that if it happened, that the said Robert was not in England at the Time of his Death, then he made the same Trustees his Executors in Trust for him 'till his Return; but in Case the said Robert died before he returned, then he made his Heir Male his sole Executor, and gave him all his Personal Estate, and soon after died before Issue. Robert Barkham the Cousin died without Issue in Spain, before the Testator; and now the Question arose upon this Will, whether Edward Barkham, who was the Heir Male of the Body of the Great Grandfather, or Mrs. Newcomen, who was Sister and Heir to Sir Edward Barkham the Testator, and likewise the Heir General of the Great Grandfather, had the better Title? 'Twas argued by Sir Thomas Powys, for Mrs. Newcomen, that Edward being living, and no Notice taken of him, 'twas plain the Testator never intended he should ever have it in the same Manner with his Brother Robert; that the 2000 l. was only a Recompence for the present Devise of the Estate Tail to Robert, and not to be carried as a Recompence throughout the last Remainder; that that was only to go to those who fully come within that Description, that the Word *Heir*, is either to denote the Person who is to take, and then it is *Vice Nominis*, and then it is to express the Quantity of the Estate which is to pass, *Hob. 31.* he that will take as Heir Male by Purchase, must be not only Heir but Male to: And said, the printed Case of *Cowden and Clerk*, and the Case of *Asbenthurst* cited at the End of that Case, were directly in Point; That without all Question, 'twas so in Limitations by Deeds, and had always been held to be the same in Wills; that in *Cooke 1. c. 6. Archer's Case*, 'twas held to be plainly a contingent Remainder to the next Heir Male of Robert Archer, and not such a Description of his Person, as to vest in him presently, for then it could never have been destroyed by the Feoffment of the Father, and 2 *Leon. Challonor and Boyer* comes up directly to our Case, and shews, that the same Construction has prevailed in a Will, as in a Deed; that in the Case of *Burchett and Durdant*, 1 *Vent. 334.* if it had not been for the Words *now living*, it had been a plain contingent Remainder; and so the Judges in that Cause agreed, and cited the Case of *Goodwright and Cornish*, 4 *Mod. 255*, to the same Purpose; and that in the Case of *Beaumont and Long*, the Word *begotten* was always held equivalent to the Words *now living*, and amounted to a Description of the Person; that there was a wide Difference between the Words, *and for want of such Issue*, and the Words, *for want of such Heir Male*; that in the first Case, the Word *Issue* was an Explanation, and Correction of the general Import of the Words *Heirs of the Body*; but in the last Case, the same Words being still used, none could claim who was not compleatly Heir Male by Purchase; but in this Case, he seemed to have done with Robert's Family, when he limited it to him, and the Heirs Male of his Body; and that he intended after, it should go as the Law directed. *Leckmere* spoke to the same Intent; that the 2000 l. given

given Mrs. *Newcomen*, could only be a Recompence for the Estate Tail limited to *Robert*; that he only postpon'd his Heirs for the Sake of *Robert*, and his Issue Male; and whenever they failed, his Heirs must come in. That indeed of late Days, Limitations of this Kind had been carried much farther than in ancient Times; but he thought they ought not to be carried any farther, for that would shake a great many Settlements, and destroy the Peace and Quiet of many Families; that the Case of *Burchett* and *Durdant* was the first Case that made any Alteration in the Construction of Devises of this Kind; and said, in *Mandevill's Case*, *Cooke Lit. 26. b.* 'twas held quite otherwise; that there was a great deal of Difference between a Lineal Heir Male, and a Colateral Heir Male, and in that, no Case had been carried so far, as to let in a Colateral Heir Male, unless he was compleatly such; that in the Case of *Burchett* and *Durdant* the whole Strefs and Foundation of the Resolution was on the Words *now living*, which they held to amount to the same as Heir Apparent, and yet that Case was strongly opposed, and went under a great Litigation; that in the Case of *Beaumont* and *Long*, the Words *then begotten* were held of the same Force, as the Words *now living* were in the other Case; and that Case went on, *and for want of such Issue*, which were plainly Explanatory, and shewed, that the Word *Heir* was only meant the Issue of his Aunt *Long*; but here 'tis, *and for want of such Issue Male*, which still preserved the Notion of legal Heir; and to take by Purchase, he must be both Heir and Male, which in this Case he is not; that the Case of *Cowden* and *Clerk* had been always cited upon these Occasions, and was never yet doubted to be Law; that my Lord *Hobert* in that Case, was clear of Opinion, that the Statute *de Donis* was only to preserve the Descent to the Heirs Male of the Body, not to direct taking by Way of Purchase; that by *Co. Lit. 26. b. 164.* if a Man has a Son and Daughter, and Lands are given to the Daughter and the Heirs Male of the Body of the Father, she takes only an Estate for Life, and the other Limitation is void; because she ought to be both Heir and Female, to take by Purchase, which she is not in this Case, the Brother being Heir. And Mr. *Ayllof* argued to the same Intent, and said, that he that will take as Heir Male by Purchase, must be compleatly such, or otherwise he can't take.

Arguments
econtra.

On the other Side, 'twas argued by Sir *Joseph Jekyll*, that there could be no sound Reason assigned for the Difference between the Heirs Male, taking by Descent, and when he is to take by Purchase; that at Common Law, before the Statute *de Donis*, such Limitations were taken Notice of, and allowed to be good; that in a Will, the Intent of a Testator who was supposed to be *Inops, Concilij*, was always to be regarded; that in the Case of *Pibus* and *Mitford*, my Lord *Hale* was of Opinion, that if the Heir Male by the second Venter, could not have taken by Descent, that he might have taken by Purchase; that the Case of *Beaumont* and *Long* was a Case in Point for them, though this was a much stronger Case; for the Personal Legacies given to the Heirs at Law, were given but once; but here the 2000*l.* is limited to the Heirs, so as in some Part to resemble Lands; for 'twas to go to her eldest Son if any, and if not, then to her Executors, &c. That there was no Difference between the

Limitation

Limitation for want of such Issue, and for want of such Heirs; that in neither Case would it be carried farther; and so 'twas held in *Dyer* 171, *Trencham's Case*; that the Words then begotten in *Beaumont's Case*, would be of no Weight to direct that Resolution; for my Lord *Cooke* tells us in his 1 *Inst.* p. 20, that *procreatis & procreandis* are the same: The Attorney General to the same Intent; that if this had been an Estate Tail in Sir *Robert*, the Great Grandfather there could have been no Doubt, the Defendant would have taken as Heir Male of his Body; that in this Case, the Intent of the Testator was plain to exclude his Heir General; that he had sufficiently provided for her, by giving her 2000 *l.* that the Meaning of the Book, which says the Word Heirs is not a good Name of Purchase, is no more than that's not a sufficient Description of the Person who is to take; but if by the Circumstances he is so described, as to notify who is meant, then 'tis a sufficient Name of Purchase; and so is the Opinion of my Lord *Anderson*, in his Report in *Shelly's Case*, that a Limitation to the Heirs Male of the Body of one who was dead, was *quasi* an Estate Tail in the dead Person; that taking it in that Sense, would reconcile all the Differences, and answer all the Difficulties that had been objected against it, and that 'twas to be taken in this Sense, 2 *Leon.* 23, 27. *Cro. Eliz.* 108. 9 *Lit. Sect* 30. *Cro. Car.* 24. *Hodgkinson and Manbood* and 1 *Mod.* 226. and 2 *Mod.* 207. The Case of *Southcote and Stowell*; That this differ'd from the Case of *Cowden and Clerk*; for the Heirs Male were not limited, or mentioned to be of his Body, as in this; That the Case of 16 *Eliz.* at the End of *Pibus* and *Milford* in *Vent.* was a Case in Point with them. Mr. *Cowper* to the same Intent, he thought the Distinction taken by the Attorney General, would reconcile the Difference, and destroy all the Fictions of the Law against them; that 'twould take away all incertainty of the Description of the Person, and carry on the Descent as the Testator intended it; that if this Notion of its being an Estate Tail in the great Grandfather were but a Fiction, yet it might be made Use of to destroy another Fiction, which excluded the Heir Male from taking. Sir *Robert Raymond* to the same Intent, That generally speaking, a Limitation to the Heirs Male, or Heirs Female, of such a one, will carry it only to those who are compleatly such; but where there are any Words, which will amount to a Description of the Person, so as to shew whom he meant by those Words, there 'twill be sufficient, though he be not Heir Male or Female in a strict legal Construction, especially, where the Heirs General are excluded, as in this Case. As to the Objection, that the 2000 *l.* was a Recompence only for the Loss of the first Tail, he said it must be taken as a Recompence for the whole; for the Defendant *Newcomen* could no more take under the Limitation to the Heirs Male of the Body of the Great Grandfather, than she would under the first Limitation to *Robert* in Tail; and therefore the Recompence must be supposed to extend to the whole, and cited a Case of *Baker and Wall* in *C. B. Pascha*, 4 *W. Rot.* 1484; yet a Person may take as special Heir, where the Intent is manifest to exclude the Heir General. *Benson* to the same Intent, That the Will of the Testator was to be observed, as far as it might be; that 'twas here in the Case of a Trust, which this Court

Court had the Direction of; that they had sometimes varied from the Rules of Law, and when they had so done, the Courts of Law, from the Inconveniences that would otherwise follow, had come to the Rules of the Courts of Equity, as in the Settlement of Terms for Years beyond a Person's Life, and so they might in this Case. Mr. *Williams* on the other Side, put this Case; if a Man has Issue *A.* and *B.* and *A.* has Issue a Daughter and dies, and the Grandfather devises a Rent-Charge out of his Estate to the Daughter of *A.* and then devises his Estate to his Heirs Male, no Doubt but the second Son shall take, though the Daughter is Heir; and said, they came into this Court only for Directions how they should be settled. *Lechmere*, by Way of Reply, said, that the Notion advanced by Mr. Attorney General, that the Heir Male of the Body of the Great Grandfather should be in *quasi* by Descent from him, was entirely new, and was attended with very great Inconveniences; for then *Edward Barkham* would be quite out of the Case. Suppose the Sister had been dead, having a Son, he would be compleatly Heir and Male too; and yet he could never take, because derived through a Female; and if *Edward Barkham* was to bring a *Formedon* he could not bring the *Espleas* in his Great Grandfather, and cited *Lit. Sect. 30.* and my Lord *Cooke's* Opinion thereon, and the Case of *Mandeville* there cited.

Opinion of
the Court

Lord Chancellor. This Will is perfectly Executory; a Conveyance is still unexecuted, and they come into this Court to direct the Manner of it. Suppose *Edward* had been Heir and Heir Male of the Body of the Great Grandfather, the Conveyance would have been made in the very Words of the Will, for then he could not take at all; it's like the Case of Marriage Articles for Settlement of an Estate upon the Husband and the Heirs Male of his Body, yet when they come to this Court for a specifick Execution, the Court models the Settlement so, as to make it effectual, and will give the Husband but an Estate for Life; the special Heir Male in this Case, was certainly within the Testator's Intention to take; but as it had been so solemnly argued, he would take Time to look into the Books, before he would give his Opinion; but said, he was strongly of Opinion for *Edward* the special Heir Male, and thought the Settlement ought to be to him, and the Heirs Male of the Body of the Great Grandfather. *Vide* the Case of *Starling contra Estrick*, 334.

Simpson versus Hornby. Vide ante 22.

Friday, Nov.
9, 1716,
7. G. in
Court.
A Devise of
Personal
Estate for
Uses, &c.
never per-
form'd, is a
void Devise.

MY Lord Chancellor having taken Time to consider of this Case, did now deliver his Opinion, by which it appeared, the Testator by his Codicil had given his Personal Estate to such Uses as his Wife, with the Consent of his Trustees, should direct; and the Wife had taken upon her to dispose of it by her Will, without any such Consent, which my Lord said, was a void Disposition; and that the Testator, as to that, must be said to die intestate *ab initio*, and ordered a Distribution accordingly.

As to the other Points, he was of Opinion, that the Wife took no Estate for Life by Implication, for he had, by the foregoing Part of his

his Will devised several Lands to her for her Jointure, and in fall of all Claims and Demands whatever, both in Law and Equity; and when he after devises after the Death of his Wife, all his Lands, Tenements, Rents, Reversions, Profits and Hereditaments whatsoever (not before disposed of) to his Daughter *Bridget*, &c. this shall be taken distributively, that is to say, all the Lands which he had before given his Wife to give to his Daughter after her Death, and all other his Lands not before devised, to his Daughter immediately; and to make any other Construction would be absurd on these general Words, when he had after, in such full and expresse Words provided for his Wife; besides that, in no Case an Heir at Law is to be disinherited by Implication, unless the same be necessary, which in this Case it is not; and as to the other Point, he said he has look'd into the Books and found this Point already settled, that *Bridget* dying in the Life-time of the Testator, the Heirs Male of her Body could not take by Purchase, for those Words are inserted to expresse the Quantity of the Estate; but if this were perfectly *Res Integra*, he thought it plainly the Intention of the Testator that *Jane* should not take till there were a Failure of Issue Male of *Bridget*, for so he thought the Words *and for Want of such Issue* fully imported; but since it had been so often resolved otherwise, he was bound meerly by those Resolutions, as it was a Point of Law; but since it was so, and an Heir at Law disinherited as to a Moiety, he would decree no Account of the Rents and Profits, there being no Infant in the Case, but left them to their Remedy at Law by Entry and Ejectment, and said 'twould be very unequitable to assist them in this Case. After which Mr. *Jodrell* moved for some farther Directions touching the Disposition of the Surplus of the Personal Estate, and mentions the Case of *Button* and *Vasball*, where Mr. *Button* having several Children, gave to his eldest Son (who had disoblged him) 10 l. and no more, and gave his Executors a Legacy, and made no Disposition of the Surplus, and it was decreed at the Rolls that the eldest Son should be let into the distributary Part of the rest of the Children; but this Decree was reversed in the House of Lords upon the expresse Words of the Will, which excluded the eldest Son from any more than 10 l. but the Court said this was nothing like the present Case, which depended on other Circumstances: Accordingly the Decree was settled.

Biscoe versus Cartwright.

THIS was a Bill brought to have the Defect of a Surrender of Copyhold Lands to the Use of a Will supplied in this Court for the Benefit of the Wife, under whom the Plaintiff claimed as a Purchasor; but there being much Litigation, whether the Wife was not otherwise amply provided for out of the Testator's Freehold and Personal Estate, according to the Fortune she brought him, which was said to be upwards of 3000 l. and the Defendant, the Heir at Law, as was alledged, having no other Provision made for him but the Copyhold, which was not above 30 l. *per Ann.* the Court said they could

Wednesday
Nov. 14, 1716.
J. G. in Court.
Where a Default of Surrendering a Copyhold shall be supplied.

make no Decree in it 'till those Facts were ascertained, and so sent it to a Master to enquire, and report it Specially.

Peter versus Russell.

Nov. 18, 1716.
The Trust of
a mortgaged
Term, &c.
decreed a-
gainst a frau-
dulent prior
Mortgage.

THIS was an Appeal from the Rolls, and was shortly thus: One *Goffe* being possessed of the *Thatch'd House* at St. James's, on a Building Lease for 60 Years, mortgages it to Dr. *Lancaster* and one *Habberfield* for securing 600 *l.* which the Defendant afterwards paid off to *Goffe*, and advanced 600 *l.* more, and took an Assignment of this Mortgage, but had not the Original Lease deliver'd to him 'till some Days after the Assignment; *Goffe* being afterwards in a declining Condition, proposed to borrow of the Plaintiff 350 *l.* on a Mortgage of a Vault and two Rooms, part of the mortgaged Premises; and on a Treaty for that Purpose Mr. *Remington*, who acted for the Plaintiff, desired to see the Original Lease; *Goffe* told him that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it safe to trust them in his own House, where all Sorts of Company resorted; upon which he goes to the Defendant, who was an Attorney in the City, and tells him he was agreeing with a Person for the Rebuilding part of the Premises at so much a Foot square, which would better his Security, and desired him to let him have the Original Lease that he might see the Dimensions of the House; the Defendant would not trust him with the Lease in his own Power, but goes along with him to the *Thatch'd House*, and after he had been there some Time *Goffe* sent for the Plaintiff, and Mr. *Remington* told them he now had the Original Lease, which they might see; and upon their coming to his House, *Goffe* goes into the Room where the Defendant *Russel* was, and desired him to let him see the Lease to shew to the Person he had mentioned, for that he was now in the House; and accordingly the Defendant lets him have the Lease, which he carries to the Plaintiff and Mr. *Remington*; they being satisfied therewith lent him the Money, and took a Mortgage of the Vault and two Rooms, insisting at the same Time to have the Original Lease deliver'd to them; but *Goffe* argued that it concerned much more than the Plaintiff had, and that he could not part with it: The Plaintiff permitted him to keep it, and he thereupon, in an Hour's Time, deliver'd it again to the Defendant *Russel*, without acquainting him with what he had done; and the Defendant swore expressly in his Answer, that he had no Notice of this Transaction, or of the Plaintiff's Mortgage; afterwards the Plaintiff lent *Goffe* a farther Sum of Money, and prevailed on the Defendant to let him have the Original Lease a second Time, but there was no Proof that the Defendant knew the Occasion of it; and he by his Answer expressly denied his having any Notice of it: Afterwards *Goffe* failed, and thereupon the Defendant brought his Ejectment, and recovered; and now this Bill was brought to have the Defendant's Mortgage postponed, upon Pretence that there was a manifest Fraud on the Plaintiff, and that the Defendant was
privy

privy to it ; and at the Rolls the Plaintiff had a Decree accordingly ; but now on Appeal that Decree was reversed.

But my Lord Chancellor said, if a Man makes a Mortgage, and afterwards mortgages the same Estate to another, and the first Mortgagee is in a Combination to induce the second Mortgagee to lend his Money, no doubt this Fraud will in Equity *postpone* his own Mortgage ; so if such first Mortgagee stands by and sees another lending Money on the same Estate, without giving him Notice of his first Mortgage, this is such a Misprision as shall forfeit his Priority ; but here is no Manner of Proof that the Defendant knew any thing of the Plaintiff's lending this Money ; nay, if there had, yet the Plaintiff appears of so much the greater Neglect, that he ought not to prevail ; that the Defendant intrusted *Goffe* with his Original Lease but for a very little while. The Plaintiff takes his Word, that he would not part with it, and leaves it wholly in his Power to go on in defrauding whom else he had a Mind to ; besides, it appears the Defendant was imposed on by *Goffe*, he parted with his Lease only to better his own Security, and had the most specious Pretence that could be for it ; and so it cannot, without manifest Proof, be objected to him, that he let *Goffe* have his Lease to shew the Plaintiff, or with a Design to draw the Plaintiff to lend his Money ; and therefore dismissed the Bill with Costs, unless the Plaintiff would in such a Time redeem the Defendant : The Cases cited were *Ray contra Pots*, and the Countess of *Bridgewater cont. Russel* and one *Classes* Case of *Yorkshire*.

Lord Pawlett *versus* Perry.

THE Defendant's Father, by his Will in 1702, devises thus, *viz.* *Nov. 20, 1716.*
As to the Disposal of my Estate I give and devise the same as Real Estate
follows : Then he devises several Lands of about 4000 *l. per Ann.* being subjected to a
the Bulk of his Estate, to his Son *Charles* the Defendant, who was his Legacy, tho'
Heir, and the Heirs Male of his Body ; and for Want of such Issue, to not charged
three others of his Sons in Tail Mail, successively, with Remainder to thereon.
his own right Heirs : Then he gives some Copper Mines, and other
Estates, to his Son *Charles* in Trust, to be sold for the Payment of his
Debts, and after gives his Daughter (with whom the Plaintiff had
intermarried) 30 *l. per Ann.* 'till she should attain her Age of 12 Years,
and after 50 *l.* a Year, 'till she should be married, and gives her 1500 *l.*
Marriage Portion, to be paid her by his Son *Charles* within three
Months after such Marriage, and makes his Son Executor, and dies ; and
this Bill was now brought to subject the Real Estate in the Hands of the
Defendant *Charles* to the Payment of this Legacy. 'Twas agreed there
was no express Clause in this Will for that Purpose ; but 'twas argued,
that there were Words which were tantamount, that he begins with the
Disposal of his Estate, which must be intended all his Estate, as well
Real as Personal ; that the Word *Estate* more properly denoted his Real
Estate than his Personal ; that this Legacy was expressly devised to be
paid by his Son *Charles*, who had both his Real and Personal Estate,
and

Note.

and so in defect of one, the other must stand charged in his Hands to make it up ; that 'twas in the Behalf of a Daughter who would be otherwise unprovided for ; and tho' the Estate was devised to his Son Charles, yet that could make no Difference, for 'twas a Charge that run along with the Estate, and bound it into whose Hands soever it came ; and they cited a Case between *Glontly cont. Pelham*, in September, 1686. and another of *Wood versus Sherwood*, at the Rolls to the same Point.

On the other Side 'twas argued, that here was no Intent to charge the Estate with the Payment of this 1500*l.* that if it should be so taken, the Devise to his Son Charles must be idle, for he must suffer a Common Recovery, and make himself Tenant in Fee in order to raise it ; that this would entirely destroy all the Remainders to his other Sons, and so frustrate his Devise to them, which he could never be supposed to intend by this Devise of 1500*l.* to his Daughter, being all in the same Will ; that the Cases where such a Charge had been allowed on Lands were where the Charge was expressly mentioned in the same Clause as a Devise to his Son T. desiring him, or to the Intent that he should pay his Legacy ; that it could not be pretended that these Lands were charged with the Payment of his Debts, for he had made an express Provision for them out of another Part of his Estate, that if he had intended to have charged his Land with this Legacy, he would likewise have made an express Devise for that Purpose, and that no Case had ever been carried so far as was now contended for.

Note,

Chancellor said, These last Arguments at present seem to him of more Weight than what had been offered on the other Side, and desired to see the Precedents in black and white, and they after came out different from what they were cited : He observed that there was a Sort of an Inclination in each Side to make the Precedents generally speak for them ; that he did not speak this by way of Censure, but commended it as the best Means to come at Justice, because there were learned Men on the other Side to put them right ; that unless the Precedents were very strong, he could see no Reason to charge the Land in this Case, and so ordered them to be searched ; but in the mean Time sent it to a Master to take an Account of the Personal Estate, to see if on a probable Computation there was sufficient of the Personal Estate at the Time of making this Will to have answered the Legacy, and if any sold or purchased in Privity of the Legacy.

Note.

Note, In Devises of Residuum, &c. the Devisee is but a Trustee for the Legatee ; and so where a Sum is devised for Maintenance of a Child, or near Relation : And in such Cases where the Devisee has squandered or disposed of the Personal Estate, the Real Estate shall be liable, for both are bound where the Devise is in Trust, especially where 'tis in Consideration of Blood. 2 Chan. c. 63. 76. 1 Chan. c. 257, 176. and ibid. 57. The Testator's Estate is bound to pay such Legacies in whose Hands soever it comes. 2 Vern. 249, 444, 616.

Mainwright *versus* Bendloe.

A Man devises by his Will all his Fee Farm Rents, in the County of N. to two Trustees and their Heirs in Trust, to sell for the Payment of his Debts; the Residue of the Money arising thereby, he devises to his two Sons, equally to be divided between them; then he gives several of his Goods to go along with his Estate as *Heir Looms*, and devises all the rest and Residue of his Stock, Goods, Debts and Chattels to his Sister the Defendant, whom he made sole Executrix; and this Bill was brought to subject the Personal Estate in the first Place, to the Payment of Debts, in Ease and Exoneration of the Real Estate devised for that Purpose; and 'twas urged, that this was the constant Course of this Court, and cited Lord *Gainsborough's* Case, and *Coot versus Moor*, upon the Earl of *Meath's* Will, and *Chichester versus Finch*, &c.

Where the Real Estate is subjected to pay Debts, &c. by the Will, &c. the Personal Estate is discharged.

On the other Side 'twas argued, that here the Real Estate was an express Fund, devised for the Payment of his Debts; that there was a great deal of Difference between a bare Charge on his Real Estate for Payment of his Debts, as by a Devise of a Term thereout for that Purpose, and the Case in Question; that here he had given his Lands out and out, and had parted with them for ever; and said, that he never intended any of them should remain in his Family; that these Lands were now to be looked upon as Money, and consequently in a Court of Equity, were Part of his Personal Estate, and so had been held in *Roper and Ratcliff's* Case, upon the *Popish* Act of 10 *William III.* about two Years ago, and other Cases; that the Residue of his Goods and Chattels, and Stock, must be intended the Residue of those which were not specially devised as *Heir Looms*; and in 1 *Leo* 203, there is an express Difference taken between a bare Charge on his Real Estate, and where 'tis devised, as in this Case, to be sold for the Payment of his Debts; and the Lord Chancellor was clear of this Opinion, and decreed, that the Personal Estate was not liable to the Debts in this Case.

Batchelor *versus* Searle

THE Plaintiff had married one Mrs. *Allen*, Sister to Sir *William Allen*, who being possessed of a Personal Estate to the Value of 2000 *l.* and being ill, makes his Will in Writing, the very Day before his Death, and thereby devises several Legacies to his Relations, and amongst the rest, gives the Plaintiff his Sister about 1000 *l.* and gives 70 *l.* to Mr. *Searle* and his Wife, and their four Children, to buy them Mourning, and gives to his dear and most esteemed Friend *Sarah Searle*, one of the Daughters of Mr. *Searle*, to whom he made his Address by Way of Marriage, 500 *l.* and gives his Horse and Furniture to one of the Defendants, by his Christian and Surname, and his Cloaths to be disposed of by his Executors, and then concludes thus: *As to the 700 l.*

Monday, Jan. 24, 1716. J. G. in Court. Q. If the Surplus of a Personal Estate shall go to the Executors, or next of Kin.

I'm entitled to in the South Sea Company, and the rest of my Personal Estate, I will that the same shall be sold for the Payment of my Debts and Legacies, and I make Mr. John and Thomas Searle my Executors, and dies. The Executors were two of the Children of Mr. Searle, and entitled to their Proportion of the 70*l.* devised for Mourning, and one of them to the Horse and Furniture, but were no Ways related to the Testator; the Surplus of the Personal Estate came to about 600*l.* and this Bill was brought against the Defendants the Executors, to have an Account thereof, and that it might be paid to the Plaintiff, whose Wife was the only Sister, and the next of Kin to the Testator. And for the Plaintiff 'twas insisted, that the Defendants the Executors were meer Strangers, no Ways related to the Testator; that they had particular Legacies left them for Mourning out of the 70*l.* and one of them had a Horse and Furniture expressly devised to him; and so 'twas not reasonable they should go away with the Surplus, but that it ought to be accounted for, and belonged to the Plaintiff, and cited the Case of *Foster and Munt* to that Purpose.

On the other Side 'twas insisted, that the Defendants being Executors, represented the Testator; that they stood in his Place, and were entitled to whatever he left undisposed of; that this was the ancient Law for many Ages; and so the legal Title being with them, they ought not to be defeated of it, without a manifest Intention of the Testator, to the contrary; that here appeared no such Intention in the Will; for they are not named either by their Christian or Sirname, or so much as by the Name of their Office, 'till the very Close of the Will; nay 'twas in Proof, that the Testator did not so much as consider whom he should make his Executors, 'till he had disposed of all the Legacies; that the giving one of them his Horse and Furniture, was only to exclude the other, who being Executor with him, would have been equally entitled to it, and could not be construed as a Legacy to shut them out of the Surplus, since it rather regarded the other Executor, than the Plaintiff the next of Kin; that they had it fully in Proof, that the Testator being asked whether he would give his Sister more, answered he would not; and being asked who should have the Surplus, or what should become of the Surplus, he said, his Will should stand as it was; that he had a very great Regard for the Defendant's Family, and was to have married their Sister; and moved, that these Proofs being in Affirmation of the Disposition, which the Law made to the Executors, might be read, and that so it has been allowed in my Lord and Lady *Gainsborough's* Case, and also in the Case of *Littlebury and Buckley*, upon an Appeal from the Mayor's Court, before the late Recorder of London; that as to the Case of *Foster versus Munt*, several Resolutions since that Time, has pared away the Authority of that Case, and re-established the ancient Law; that so it had been settled in the Dutches of *Beaufort's* Case, in the House of Lords; and the Case of *Littlebury versus Buckley*; and also in a Case between *Ball and Smith* and others; and so 'twas prayed the Bill may be dismiss'd. And

The Chancellor was clearly of this Opinion, and that the Proofs being in Affirmance of this Disposition, which the Law made, ought to be read, and accordingly they were; and said, they were so clear, as to make an End of this Case, and without a strong and violent Implication; the Executors ought not to be defeated of this *Residuum*; that here was no such Implication in this Will, but rather the contrary, as has been observed at the Bar; that to make Sense of that Clause, it must be construed as a Devise of the *South Sea* Stock, and the rest of his Personal Estate to his Executors; for it immediately follows, *I make John and Thomas my Executors*, which could have no Relation to the Direction for Sale, unless, by giving them the Surplus, which should arise by Sale; that in the Dutches of *Beaufort's* Case, the Devise of the Plate, except the Use thereof, which he gave to his Executrix Lady, was an express Devise of the Plate to the Executrix Lady; and here it was only inverting the Order of the Words, but in Effect, the same as an express Devise thereof. So where one gave all his Books, except such and such, which he gave to his Executors, 'twas the same in Effect, as an express Devise thereof to his Executor, only inverting the Order of the Words; and yet in these Cases, the Executrix went away with the Surplus, and said, that in no Case, unless the Implication was violent, and such as could not be resisted, the Executors ought not to be shut out of the *Residuum*, which, by their Representation of the Testator, belonged to them; and so the legal Title being with the Executors in this Case, and no such strong and violent Implication to endure any other Construction, he could not give into so great a Change of the Law, but must decree for the Executors, and did so accordingly.

The Surplus
decreed to
the Execu-
tors.

Lord Bernard's Case.

HE was Tenant for Life (*i. e.* by Courtesy) without Impeachment of Waste; and this Bill was brought against him by those in Remainder for an Injunction, to stay his committing Waste, and by the Proofs in the Cause, it appeared, that he had almost totally defaced the Mansion House, by pulling down a great Part, and destroying the other Part, and was going on entirely to ruin it. Whereupon the Court granted an Injunction, not only to stay his committing farther Waste, but also ordered a Commission to Issue to six Commissioners, whereof he to have Notice, and to appoint three on his Part, or in Default of the six Commissioners, to be named *ex parte*, to take a View, and make a Report of the Waste committed; and that he should be obliged to rebuild, and put it into the same Plight and Condition, it was at the Time of his Entry thereon; and 'twas said, the like Injunction has been frequently in this Court, and that the Clauses, without Impeachment of Waste, never were extended to allow the very Destruction of the Estate itself, but only to excuse from permissive Waste; and so such a Clause would not give Leave to fell or cut down the Trees, which were for the Ornament or Shelter of an House, much less to demolish or destroy the House it self; and so 'twas ruled in Lord Nottingham's Time. See 2 Chan. Caf. 32.

Tenant by
Courtesy,
&c. refrain
from com-
mitting
Waste.

Humerston

*S. L. lat. verb. Rec. in
Chanc. 455.*

Humerston versus Humerson.

S. L. 2. Vern. 737. 1. P. W. 332.

Limitations
in a Will to
20 Persons
in esse suc-
cessively, in
Remainder
for Life, (or
Tail) no
Perpetuity.

THERE were several Questions in this Case, upon the Will of one *Humerston*, one whereof was concerning his Intention to perpetuate his Name, for which Purpose, he had given a very considerable Estate to the *Drapers Company* and their Successors for ever, upon Trust to settle the same upon one of the Name of *Humerston* for Life, and after his Death, to his first Son for Life, and so to the second and all other his Sons for Life only; and for want of such Issue, then to another *Humerston*, and so he reckoned 20 or more of that Name, to whom he gave only Estates for Life, with the like Remainders to the first, and other Sons of each of them respectively, as they should become entitled thereto; and if there were none of the Name to be found in *England*, then the Trustees and others were to chuse out the most comely young Man they could find in such a Parish, and he to take on the Name of *Humerston*; and then the Estate to be settled on him for Life, with several Limitations over in like Manner, without limiting an Estate Tail or in Fee to any of them, or making any Disposition of the Fee; but both Court and Council held that to be such an Affectation and Tendency to a Perpetuity, that nothing was said in the Support of it; but the Limitation for Life to the several Persons *in esse* were held good, and a Settlement decreed to be made accordingly, *viz.* to to the first *Humerston* named in the Will for Life; Remainder to Trustees, during his Life, to support contingent Remainders, with Remainder to his first Son, and the Heirs Male of his Body, and so to the second, &c. and 'twas held clearly, that the Words *and for want of such Issue* in the Will, would not raise an Estate Tail by Implication to the first *Humerston*, so as to take against such express Limitations to him for Life only, and 1 *Leon.* 256. *Manning* against *Andrews* was cited.

Dolman versus Smith & al.

*Feb. 5, 1716.
J. G. in
Court.
Q. If a Per-
sonal Estate
should be
subject to
Debts, &c.
when ex-
pressly char-
ged on the
Real Estate,
and decreed
it should.*

SIR *Thomas Dolman* by Will, *February 5, 1710*, devises all his Household Goods and Furniture to the Defendant *Sarah Smith*, and 1000 *l.* to the Plaintiff *Dorothy Dolman* his Niece, payable at 25, and likewise 500 *l.* to the Plaintiff *Lewis Dolman*, payable at 25; then he devises all his Manors, Lands, Tenements and Hereditaments, to Trustees and their Heirs, in Trust for the Payment of his Debts, Legacies and Funerals, and does by his Will, expressly charge them with the Payment thereof; then he directs, that the Trustees shall receive the Rents and Profits of his said Estate, 'till his Nephew *Thomas Humphry Dolman* should attain his Age of 25 Years, and thereout to allow him 30 *l.* per Ann. and 20 *l.* per Ann. apiece to the Plaintiffs *Lewis* and *Dorothy*, 'till they should all attain their respective Ages of 25, then he devises the Residue of the Rents and Profits, together with his said Estate, to his said Nephew *Humphry Dolman* in Tail Male, Remainder

to

to the Plaintiffs *Lewis* and *Dorothy* in Tail Male successively; Remainder in like Manner to three of the Defendants, with Remainder to the right Heirs of one of them who was a Stranger, and no Relation to the Family; then he devises several Things to go along with the Estate as *Heir Looms*, and afterwards devises all the rest and Residue of his Goods, Cloaths and Personal Estate, not before bequeathed to his said Nephew *Thomas Humphry Dolman*, and makes the Trustees his Executors and dies. *Thomas Humphry* dies without Issue at the Age of nine Years, and the Plaintiff *Mary* his Mother was Administratrix to him; and the only Question was, whether the Personal Estate in this Case belonged to the Administratrix of *Thomas Humphry Dolman* exempt from Debts and Legacies, and Funerals, or if the Personal Estate should be apply'd in the first Place towards Satisfaction thereof, notwithstanding this express Charge on the Real Estate for Payment thereof; but which Way soever 'twas taken, 'twas agreed the Surplus of the Personal Estate must be subject to a Distribution between the Plaintiffs *Lewis* and *Dorothy*.

'Twas urged for the Plaintiffs, that the Testator had in this Case expressly charged his Real Estate with the *Payment of his Debts, Legacies and Funerals*; and so the Personal Estate ought to be exempt therefrom; that he had specifically devised away a great Part of his Personal Estate, and that it was without Question no Way subject thereto; no more, as 'twas urged, could the Residue in this Case, because the devising it by such general Words, was only to save the Trouble of enumerating the Particulars, which, if the Testator had done, that would have made it a specifick Devise thereof, and consequently as much exempt as the Particulars before devised; that the Devise was of the *Residue before unbequeathed*, so that every Thing but what was before bequeathed or devised, must pass by this Clause, and no Room left to confine it to the Residue after Debts, &c. which, if the Words had been general, might be supposed the Intent of the Testator.

On the other Side 'twas urged, that the Personal Estate was the natural Fund for Payment of Debts; that if there was no Clause to exempt it, this Court had always subjected it in the first Place, notwithstanding any Devise of the Real Estate for Payment thereof; that the Personal Estate had been made liable in this Court, where the Real Estate had been expressly sold out and out; that the Testator could not be supposed to have any Regard for his Heir, that the charging his Real Estate in these Cases, was only in Aid of his Personal Estate, in Case that should not be sufficient; that *Heres factus* as well as *Heres natus*, had been always allowed the Benefit of the Personal Estate, towards Satisfaction of his Debts in the first Place; that if an Estate descend with an Incumbrance to the Heir, that he should have the Aid of the Personal Estate to disincumber it. But to this, *Vernon* said, that that could be only where there was an express Covenant for Payment of the Money which descended in Point of Lien along with the Estate, yet, by Reason of the Covenant, which was Personal, the Executors should be bound to discharge it out of the Personal Estate in the first Place. But there was no Pretence in the World, that if a Man purchased an Estate subject to

an Incumbrance, that his Heirs should have Aid of the Personal Estate to disincumber.

But my Lord Chancellor, upon the whole Frame of this Will, was of Opinion, that the Personal Estate was to be apply'd in the first Place, in Ease of the Real Estate, first, because there was no express Clause to exempt the Personal Estate, and that had been always the Distinction taken in this Court. *Secondly*, It appears, that the Heir of this Family was not to have the Real Estate, 'till the Age of 25; nay, not so much as the Rents and Profits, which should actually fall, and become due before that Age; that the Testator appeared throughout to carry a very frugal Intention, and so would allow his Heir no more than 30 *l. per Ann.* for his Maintenance, and that too, is carried beyond the usual Time, *viz.* his Age of 25; for he was to be trusted with nothing more 'till his Age of 25. But on the other Side, he must be intended indefinitely to trust him with the Personal Estate, without Limitation to any Age; so that he may squander it all away, and waste it as soon as ever he came to it; and that both the Real and Personal Estate in this Case, were to come in the same Hand; and so he was to have no such frugal Intention, with Regard to the one, and leave it so loose as to the other; that if the Personal Estate had been devised to a Stranger, it might have had another Consideration from the Meaning of the Words *before unbequeathed*; but here he thought it could not; and accordingly he decreed the Personal Estate to be subject in the first Place to the Debts and Legacies, and afterwards the Real.

Anyons versus Fryers.

Wednesday,
Feb. 6, 1716,
7. G. in
Court.

A second
Will not
duly execu-
ted, no Re-
vocation of
a former
Will, though
cancelled.

S. C. Pro. in Chanc. 459. & in the books cited
in new edition of books.
A Man makes his Will duly executed, and attested, according to the Statute of Frauds and Perjuries; and at the same Time in the like Manner, executes a Duplicate thereof. Some Time after, the Testator having a Mind to change one of his Trustees, orders his Will to be wrote over again, without any Variation whatsoever from the first, save only in the Name of the Trustee so changed; and when it was so wrote over, he executed it in the Presence of three Witnesses; and the three Witnesses subscribed their Names, but not in his Presence; after this, the Testator cancels the Duplicate, by tearing off the Seal, and then dies; and the Question was, whether the second Will not being good as a Will to pass Lands, should yet be a Revocation of the first; and if it should not, whether the cancelling of the other should be a Revocation thereof, within the Statute of Frauds and Perjuries; 'twas decreed, that neither the making the second, nor the cancelling of the first, was a Revocation thereof, though in the second, there was an express Clause, that he did thereby revoke all other former Wills. On the hearing of this Cause, the Chancellor took this Distinction, that the second Will was not intended barely as a Revocation of the first, so as to signify his Intention of dying intestate, or without any Will, but doubtless, was intended as an effectual Will to pass the Lands to the Persons, and in the Manner thereby devised, in the same Manner as in the former Will; And therefore seeing it was not good as a Will to that

that Purpose, it could be no Revocation of the first; for 'twas not intended to be a Revocation of the first, but as 'twas supposed to be valid as a Will, for passing the Lands by the second: And if a Man by his Will devises Lands to *A.* and after makes a second Will, and thereby devises the same Lands to *B.* if this second Will be not good as to the passing the Lands to *B.* it shall be no Revocation of the Devise in the first to *A.* for 'tis plain *A.* was to lose what *B.* was to gain; and if *B.* gain nothing by the second, *A.* shall lose nothing that was given him by the first; but if a Man executes a second Will, which appears to have no other Intention, than only to revoke the first, and die intestate, though the second be not in all Circumstances duly executed as a Will, whereby to pass Lands, yet it will operate as a Revocation of the first.

And as to the cancelling and tearing the Seal off the first Will, that is no Revocation of it in this Case, because that was no self-subsisting Independent Act, but done in Contemplation, or by Way of Affirmation of the second Will, 'twas done from an Opinion, that the second had actually revoked the first, and so he tears the first as of no Use; but if the first was not actually revoked by the second, that Act of tearing the first, will not destroy it neither; for though a Man may, by the Statute of Frauds and Perjuries, as effectually destroy his Will, by tearing or cancelling it, as by making of a second, yet if he does make a second, and intends that as a Revocation of the first, if it be not sufficient for that Purpose, as in the principal Case, the tearing or cancelling of the first, being only in Consequence of his Opinion, that he made a good second Will shall not destroy the first; but it ought to be set up again in this Court: And he said, he thought this was consistent with the Resolutions that had been given in 3 *Mod.* 258. 1 *Show* 89. *Egleton cont. Speck*, and a Cause cited by Serjeant *Hooper* in *C. B.* wherein he argued, That where a Man by Will gave Lands to *A.* for Life, Remainder to *B.* in Fee; and after, by a second Will, executed in the Presence of three Witnesses, but not signed by the Witnesses in the Testator's Presence, he gave the same Lands to *A.* again for Life, Remainder to *C.* in Fee; this was held no Revocation of the Remainder to *B.* notwithstanding an express Clause of revoking all former Wills. And 'twas held clearly, that the effectual cancelling or revoking either the Duplicate, or original Will, is an effectual avoiding of both, they being both but one Will, and so must stand or fall together.

A cancelling of the Duplicate, cancels the original Will. *Q.*

Brown versus Barkham.

J. C. ante 116.

THE Chancellor having taken Time to consider of this Case, did now declare his Opinion; first he puts the Case at large, and then premises, That naturally, and according to the common Sense and Reason of Mankind, every one, at first reading the Will, would be clear of Opinion, that the Testator's Intent in this Case, was to give his Estate to his Heir Male, and none but a *Lawyer*, and one whose Judgment is byass'd by the Learning of the Law, could possibly understand otherwise; but since Resolutions of Law, and Decrees in Equity, have

Feb. 1716,
J. G. in
Court.
Where there
may be
Hares Viventi.

have from Time to Time introduced and established certain Rules and artificial Modes of Property, he thought it necessary to consider such of them, as had been cited, and made Use of to disprove this natural Construction of the Will before he gave his own Judgment; the first that has been cited is, that he who takes as Heir or Heir Male, can't take whilst his Ancestor is living; for the Rule is, that *nemo est Hares Viventis*, and this is *Archer's Case* 1 C. 66, but the Rule makes nothing in the present Case; first, because here the Ancestor was dead at the Time, when the Devise took Place; secondly, because here the Words of the Devise are all strictly and literally verify'd of the Person, that is, to take as Heir Male when the Devise took Place; and so nothing can be inferred from that Rule, to influence the present Case. But now in *Archer's Case*, the Words were not all true, concerning him who was to take as Heir Male; for his Ancestor was living at the Time when the Will took Effect; and so according to the Rule before-mentioned, he could not take as Heir Male; but in our Case, the Ancestor being dead long before even the making of the Will, the Defendant *Barkham* may be truly and literally called his Heir Male, and consequently capable of taking by that Name, if nothing else hinders. Another Case that has been cited is the Case of *Challenor* versus *Boyer*, 2 Leon. 70. but that likewise is nothing to this Purpose, because there the eldest Son was living, when the Remainder should have vested in the Heir of his Body, which it could not do, during his Father's Life; for during his Life, he was no more Heir Male, than he was Heir Female; so neither the Case in *Dyer* 99. is of any Force at Law in the present Question; for there the Son who claimed the Remainder, was to make himself right Heir, both of the Body of the Father and Mother, which during his Father's Life, he could not do; but in that Case it's strongly imply'd, that if the Father had been dead, the Son should have taken as right Heir of their two Bodies.

A second Objection has been made, that he who takes as a Purchaser by the Name of Heir Male, must answer the whole Description; that is, he must be Heir and Male, which the Defendant *Barkham* is not; but this is a Rule that has no Foundation in Natural Reason, but is raised and supported by the Artifice of the Lawyers, and under this Head we may consider the principal Case of *Counden* and *Clerk*, and *Sexbursf's Case*, cited at the End of that Case; and also the Case of *Sterling* and *Estrick* in this Court; in all which Cases 'tis observable, first, that the Limitations were only to the Heirs Male, not saying of the Body; secondly, whoever observes carefully the Manner of my Lord *Hobert's* Arguments, Fo. 32. will find his own Opinion to have been for the Devise, if it had been made to the Heirs Male of the Body; and there seems to have been some Mistake crept into the Print, in the transcribing that Part of the Case, which looks to have been at first otherwise; and as to the Case of *Sterling* and *Estrick*, besides that, there is no Mention of the Word *Body*, that was in the Case of a Deed, directing a Conveyance to his Heirs Male; and so he thought the Decree in that Case extremely right, and should have given the same, if it had come before him; but now none of all these Cases do in any Sort affect the present Case; for if he

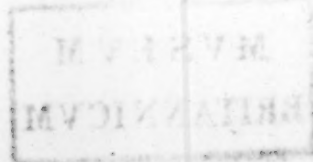
the Reason for rejecting this Devise were good, because Part of the Description of the Person intended to take, was not true; the same will be a good Reason for allowing the Devise in the present Case, where the whole Description is strictly and literally true; for without Question, one may take as Heir Male of the Body of a Person deceased, who is no Heir General of the same Person; first, because the Intent of the Testator is manifest, and appears at first View, who was the Person meant to take thereby; secondly, the Distinction between taking by Purchase, and taking by Descent, where the Words are the same, though it be mentioned in Books of a good Authority; yet it seems to have no good Foundation of Reason or Authority of Law to support it; and if it should prevail in all Cases, would overthrow another Rule of Law, as certain, and as well established, which is, that a Person may take by Purchase, if he be sufficiently described, though he has neither Addition of Christian or Surname given him; nay, tho' his Christian Name be false or mistaken, as appears by several Cases put to this Purpose in *C. L. 3. a.* and if so, certainly such a Description of the Person as has all the Marks and Characters, whereby he may be known, and is defective in none, must be sufficient to entitle him under that Description; and that is the present Case, for the Words here are all true; Secondly, they are no more than true; for *Edward Barkham* in the strictest Propriety of Speech, is Heir Male of the Body of his Great Grandfather, and the Books which are to the contrary, infer to make out their Conclusion, that the Words are not true, which shews, that if they are true, the Authority of those Books must fail; now that they are not true, they endeavour to prove, by urging, that the Person who is to take by such a Description, must be both Heir Male and Heir General; for if he fails in either, he is not the Person described; but this surely is no good Reason, though it be true, that the Word *Heir* taken singly by itself, can be true of none but him who is Heir General; yet when they are joined with the Words *Male or Female of the Body*, they are true of him or her who descends from the Body, though they are not Heirs General; and to say otherwise, is a very disingenuous and unfair Way of construing Words. For suppose a Man has Land at Common Law, and other Lands in *Burrough English*, and he devises his Lands at Common Law, to his Heir in *Burrough English*; or suppose a Man has Lands at Common Law, and other Lands in Gavelkind; in these Cases, if a Man stop at the Word *Heir* or *Heirs*, 'tis certain the youngest Son in one Case, or all the Sons in the other Case, can't take, because the eldest Son is *only* Heir; and so this can never be a just Construction of such a Will; but now take all the Words together, and it is then most certainly a good Devise to the youngest Son who is Heir in *Burrough English* in the first Place, and to all the Sons who are Heirs in Gavelkind in the other; so in the principal Case leave out the Words *Male of his Body*, and then no Doubt but the Heir General is to take; but as these Words were added, to distinguish him from the Heir General, it would be a very unjust Way of wresting, and perverting a Man's Words, to leave them out purely to let in another whom the Testator never intended should take, and

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the



the Addition of these Words was purely to distinguish him from the Heir General; yet you say, none can take but the Heir General, tho' to give it from him, those very Words were added, to distinguish the Person described to take, which is all one as to say, though the Law allows an Heir General and Heir Special, as two distinct Persons, yet none can take, who is not Heir General and Heir Special in one Person, which is to confound and destroy the very Distinction itself between them; besides, here the very Person to take is certain, and known; *Edward Barkham*, and no other, is Heir Male of the Body of his Great Grandfather, and the Description of him by these Words, is correct and perfect; Thirdly, if the Words *Heirs Male of the Body* in the plural Number are a sufficient Description to convey Lands by Descent from the Ancestor to the Heirs Male of his Body, they are as sufficient to pass such Lands to the same Heir Male of that Body by Purchase, where the Intent of the Testator appears to be so; and this is not a Construction wrought upon the Statute, for that Statute does not determine or meddle with what are Words of Purchase, and what not, or how the Heir of the Body that is to take, shall be described; nor is there any such Distinction between a Purchase and a Descent arising upon that Statute; for the Words here made Use of in this Devise, were all at the Common Law long before this Statute of *Donis*, which did not create such Heir Male of the Body, for he would have taken by such a Devise at the Common Law, as sufficiently described and known; and the Statute only affirms the Description; and this he said, was the principal Reason of the Opinion he was now to deliver, and the Authors which have been cited to the contrary, do not at all come up to the Case, there being no mention of the Word *Body* in any of them; and as to the Opinion of *Hob. 32.* that the Words *Heirs Male of the Body* are not sufficient Words of Purchase, where another is Heir General; he said, First, that that Point was not at all necessary for the Determination of the principal Case; secondly, from those Expressions in the Book, it looks rather like a Mistake, than *Hobert's* own Opinion; thirdly, if it were his Opinion, it seems not to be Law, because a Limitation to the Heirs Male of the Heir Male of the Body of a Person dead before, was sufficient to vest in them by Purchase without the Statute, and before the Statute *de Donis*; and so is *John de Mandeville's* Case, *C. L. 26.* which he cited and apply'd, and said, the whole Difference in those Cases, was between a Devise to the Heirs Male or Heirs Female of the Body; and as to *Shelly's* Case, the principal Case there was rather a Confirmation of this Opinion; for there the Ancestor was dead at the Time when the Limitation took Place; and for my Lord *Cook's* Report of that Case, it seems only to be his own Argument, as he was of Council in it; and though he does indeed lay down the Distinction between taking by Purchase and by Descent; yet *Wray* Chief Justice, when he comes to sum up the Reason of the Judgment, he takes no manner of Notice of that Distinction; so that it seems to be only my Lord *Cook's* own Opinion, without any Authority to support it; but then indeed this Doctrine is again transcribed into his first *Institutes 24, &c.* and *Shelly's* Case cited for it, which is the only Authority to warrant that Distinction; for as to the



the Year Books, referred to in the Margin, he said, he had looked into every one of them with all the Care he could, that he might go to the Bottom of the Question; and those Books are so far from wanting such an Opinion, that there is but one of them at all to the Purpose, and that is directly contrary to what it is cited to prove; for as to the 9 H. 6. 23 and 24. and 11 H. 12. it was a Limitation only to the Heirs Male, not Heirs Male of the Body; besides that, he was not *in esse*, when the Limitation to him was to take Place, and so that Case can be no Ground for my Lord Cook's Opinion; another Case cited to support this Opinion, is the 27 H. 8. Bro. Tit. de Donis Sect. 61. But on looking into the Case, it appears to be nothing at all to the Purpose, and Bro. Tit. 140. Hussey's Case, there is no judicial Resolution on this Point one Way or other, and Dyer 374. is only an imperfect Report of Shelly's Case; and from the Weakness of these Authorities, to prove the Doctrine contended for, he took Occasion to observe, that there was no relying on sudden Opinions, as cited in Books; and for the Support of his own Opinion, he cited Roll 454. and 2 Ven. 311. Burchett Cont. Durdant alias James against Richardson, which he said was a much stronger Case than this now in Question; for there the Ancestor was living, and yet it was held such a Description of him, as to let him in during the Ancestor's Life, though that was a Dispensation with an ancient Maxim of Law, *quod non est Hares viventis*, but in our Case, no Maxim of Law is infringed; but Beaumont and Long's Case in the House of Lords lately, is still a much stronger Case, for there was not so much as the Words of the Body, and yet the Heir was sufficiently described to take, even in the Life of his Aunt Long, so that he thought those Opinions of my Lord Cook and Hob. to be very much outweigh'd by the Authority of these later Resolutions; then he cited the Case of Pibus against Mittford, 1 Vent. 372. and said, that my Lord Hale did not think fit to rely on the common Point of the Father's taking an Estate Tail by Implication; but held the Words Heirs Male of the Body of his second Wife, a sufficient Description to vest in the Heirs Male of the Body of such Wife by Purchase; and though the Reporter of that Case introduces the Argument of my Lord Hales, only with his saying, that of that he was not well satisfied; yet in the Argument of my Lord Hale, after he seems to have professedly set about confuting that Opinion, and takes Notice of such Heirs Male of the Body, as a Special Heir at Common Law before the Statute de Donis, who was capable of taking by Descent from the Heir General; and what he cites thereout of Lit. Sect. 332. of performing the Condition as near the Intent as may be, he proves in the present Case, that the Settlement must be made to the Person who is the Heir Special; and said, he had never met with any other Case to the contrary, but only the Opinions before mentioned of Cook and Hobert; as for the Case at the End of that of Pibus and Mittford, it is directly in Point for the Special Heir Male, and in that Case he took Notice of his Heir General, as he does in the present, and therefore could never mean that his Heir Female should take it, when he expressly gives it to his Heir Male; and in that Case, Justice Wild was of the

same Opinion in that particular ; so that it has the Authority of two Judges there ; and the Reasoning of my Lord *Hale* there, must surely convince all that hear it, and is much stronger than the beforementioned Opinions of *Cook* and *Hobert*, the last whereof amounts to no more than that he doubted of the Law in this Point ; then he cited the Case of *Braker cont. Wall, Hill 8. W. 3. Rot. 1484. in C. B.* where a Man made his Will in this Manner : *I give my eldest Heir Male, and bis Heirs Male for ever, all my Lands in such a Place, and if there be a Female, she to have 12 l. per Ann. as long as she lives ;* and the Testator having two Sons, the eldest of which was dead in his Life-time, leaving a Daughter who was Heir General, yet the youngest Son went away with the Land ; and that Case as it appears by the Adjournment on the Rolls, was depending for a considerable Time, so that it seems to have been settled with great Judgment and Deliberation ; and in that Case there were several Expressions, to shew that he never meant his Heir General should take. As to the Case of *Goodwright and Cornish*, which has been cited, he said, it was nothing at all to the Purpose, and therefore he took Notice of it : Last of all, and upon the Whole, concluded that the Words of this Will were sufficient to vest the Entail in Question, in the Heirs Male of the Body of the Great Grandfather, first, because natural Reason, common Sense, and the Intent of the Testator allowed it ; secondly, because the Arguments to the contrary, are now brought into a very narrow Compass and Weight ; thirdly, that the Weight of them, if any, was overweigh'd by judicial Resolutions in much stronger Cases ; and therefore the only Doubt now remaining was, how this Trust should be executed ; in considering whereof he said, that the Limitations to the Heirs Male in the Plural Number, made no manner of Difficulty, for so was *Shelly's* Case ; and when a Conveyance comes to be made, it must be to the Person who is Heir Male in the Singular Number ; and the Words are more skillful in the Plural Number, than they would have been, if they had been only in the Singular, as they do denote the Person who is to take, and do at the same Time describe the Quantity of the Estate he is to take, and thereupon decreed, that the Trustees should execute a Conveyance to *Edward Barkham*, and the Heirs Male of the Body of his Great Grandfather, For in this Case *Equitas sequitur Legem*, and the Conveyance must be as near the Intent of the Testator as may be, according to the Rule before mentioned, *Lit. Sect. 352.* and a Conveyance was decreed accordingly.

Northy versus Burbage.

Easter Vacation, 1716, J. G. at the Rolls. Devise to all his Children and Grandchildren, intends only those in esse.

IN this Case, it was said by the Council, and agreed to by the Court, that a Devise to all his Children and Grandchildren, extends only to those that were *in esse* at the Time of the Will made, for then the Will speaks ; and no Children born after, are to be let in, unless there had been future Words in the Will, as all his Children and Grandchildren, *which should be born or living at his Death.*

Secondly,

Secondly, That a Grandchild is not within the Custom of London, to come in for his Father or Mother's Share, together with the other Child of a Freeman; and this hath been settled by the present Lord Chancellor, where a Deed by Way of Provision being made by the Grandfather, after the Father's Death, in Order to introduce him into the Father's Place, was set aside, as made in fraud of the Custom, against the surviving Child.

A Grand-child not within the Custom of London.

Thirdly, The Testator in the principal Case, being a Freeman of London, by his Will in Writing declared, that he had given 1000*l.* to one, 1000 *l.* to another, and so to the rest of his Children, in full of their Orphanage Part, by the Custom of London; yet this Declaration let them in bringing their Sums into Hotchpot to their full customary Shares of the whole; but whether the Sums mentioned in the Will, should be taken to be the whole of what the Testator had given them, or if the Parties concerned were at Liberty to prove more paid them, was the greater Question, and the Court seemed inclinable to let them into the Proof thereof.

Hotchpot.

Fourthly, A Devise of 500 *l.* apiece to two of his Grandchildren by Name, and if either of them died, his Share to go to the Survivor, and if both died, then their Shares to go to their Mother; one of them died in the Life of the Testator, yet his Share went by the express Words of this Will to the other Grandchild, and was held to be no lapsed Legacy.

Lapsed Legacy.

Piggot cont. Penrice.

THIS was an Appeal from the Rolls, and the only two Points in Question were; First, where one by Will devised in this Manner, *I make my Niece Gore, since married to Sir Henry Penrice, Executrix of all my Goods, Lands and Chattels.* Whether any and what Estate passed in the Land by the Devise, it appearing in the Cause, that the Testator had no Terms or Interest for Years in any of the Lands in Question? The second was, where the Testatrix had made a Settlement with Power of Revocation by Writing, executed under Hand and Seal, in the Presence of three Witnesses, not being menial Servants; and some Time after, being indisposed, wrote a Letter, (which was read and proved in the Cause) signifying her Intention to revoke these Uses, and desiring a Deed might be prepared, pursuant to the Power for Revocation thereof, and settling the same on her Niece Gore, Whether this should be construed to amount to a Revocation, she dying before any Deed was prepared, or any Revocation actually made?

Saturday, May 18, 1717, J. G. in Court. Where an Executor may be, as to Lands, and Lands liable to Debts, &c. and what Writing, &c. may revoke a Will.

As to the first Point 'twas argued, that this Devise was sufficient to pass the Lands, and to give the Devisee an Estate of Inheritance therein. That if it were otherwise, the Word *Lands* would be useless, and must be rejected, there being no Terms nor Interests for Years in any other Lands; that if one says in his Will, *I make such a one universal Heir,* this will pass not only his Real, but his Personal Estate likewise; and this has been oftentimes allowed; and yet these Words are as improper,

Lands liable
to Debts and
Legacies.

per, and as little applicable to the Personal Estate, as the Words in the present Case to the Real Estate; that by making her Niece Executrix of her Lands, she gave her a Power to sell and dispose of her Lands, and that without Question, would have passed a Fee; and by this Devise, *the Lands are made subject to the Payment of Debts and Legacies*, and under the Controul and Management of the Executrix, in the same Manner as the Goods and Chattels, whereof she is made Executrix in the same Clause; and if she should have but an Estate for Life therein, she might possibly die before she was reimbursed out of the Rents and Profits, what she had paid for Debts; which is the Reason that a Devise to one paying my Debts, will pass a Fee.

As to the second Point, 'twas argued from several Expressions in the Letter, that she had a manifest Intention to revoke the Settlement; that she went as far as she could towards it; that she expressly gave Directions to have a Deed prepared for that Purpose; and that the Reason of its not being compleated, was her dying so soon, which was the Act of God; that if this Letter had been sealed and attested, pursuant to the Power, it would without Question have been a Revocation; and they cited *Albemarle's Case*, where a Revocation was to be in the Presence of six Witnesses, whereof three to be Peers; yet 'twas held in that Case, that if the Person was beyond-Sea, or under any Disability of having three Peers, and pursued his Power of Revocation in all other Circumstances, that would be effectual in a Court of Equity.

But my Lord Chancellor was so clear of Opinion in both Points against them, that he affirmed the Decree somewhat hastily, without hearing of Council on the other Side. As to the first Part, he said, whatever his private Opinion might be, of the Intent of the Testator, to give her Niece those Lands, yet in Point of Judgment, he could not decree for her; that it was a most known and established Rule of Law, that an Heir is never to be disinherited, but by express Words, or necessary Implication; that here were neither in this Case; that the Word *Lands* was not however useless, or to be rejected; for that in all Probability, there might be Rents in Arrear of the Lands, and by making her Executrix of her Lands, the Rents of those Lands would pass; that nothing certain could be inferred from such a Devise, and therefore he must not break into the settled Rule of Law to support it. And as to the second Point, there might be good Reasons for putting herself under that Restraint, in the Manner of Revocation, to prevent Surprize or Inadvertency; that there was no Pretence of any Obstruction from the Persons who claimed under that Settlement; that here was nothing more than a bespeaking of a Revocation, and the Completion of it prevented by her Death; that no Cause had ever yet gone so far; and therefore 'twas too hard for him, and affirmed the Decree. *Note*, the Testatrix by her second Will, gave Part of these Lands to charitable Uses, and they were decreed at the Rolls to be good as an Appointment upon the Act of Parliament, notwithstanding there was no Revocation; but that Point was not now in Question.

Turfaker

Tursaker cont. Robinson.

A Man seized of Lands, which, by the Custom of the Manor, could not pass but by Deed, Surrender and Admittance, and having a natural Daughter, does by Deed, in Consideration of 300*l.* therein mentioned to be paid by the said Daughter, grant and convey these Lands to her and her Heirs, and she was admitted accordingly; but no Surrender was made of these Lands, as the Custom required; and at the Foot of the Admittance was a Provision, that her reputed Father should hold and enjoy these Lands for Life; also in the Deed was a Covenant for further Assurance, but for want of Surrender according to the Custom of the Manor, this was agreed to be a defective Conveyance; so this Bill was brought against the Heir at Law, to supply this Defect, and to have further Assurance, according to the Covenant; and whether this Court could supply it in Behalf of a natural Daughter, was the single Question. It was urged for the Daughter, that she ought to be considered as a Purchaser having paid 300*l.* for it; but 'twas said on the other Side, that though 300*l.* was mentioned in the Deed as the Consideration, yet no Money was ever paid, and the Plaintiff could make no Proof of any Money paid; 'twas also urged for the Plaintiff, that after her Birth, her Father had married her Mother, and therefore, though she was a Bastard by our Law, yet by the Law of the Spiritual Court, she was looked upon as *Mulier puissa*, though before Marriage she was Bastard *Eigne*, for that, by their Law, *Matrimonium subsequens tollit peccat' precedens*; but of this Marriage likewise with her Mother, she made no Proof. 'Twas urged, that she being his natural Daughter, he was by the Law of Nature, obliged to provide for her; and that this Court ought to supply a defective Conveyance, intended for that Purpose, as it had been in many Instances for younger Children, and the rather, because of the express Covenant for further Assurance, which they came here to have a specific Performance of; and that she ought to be looked upon as a Purchaser, and to have the Benefit of that Covenant. On the other Side, 'twas argued by Sir Thomas Powis and others, that though the reputed Father, if he thought her to be his Child, was obliged by the Law of Nature to provide for her, yet no Body else was; that this Court was under no such Obligation; so she was to be considered now as a meer Stranger; and to supply a voluntary Conveyance, that is defective for a Stranger, against an Heir at Law, was what never was attempted before; that she was to be considered as *nullius filia*, and could not be considered as a Child in any Court; and that the Court was to follow the Law in such Cases; that though her Father had a great Affection for her, yet that was not such an Affection, as would raise a Use at Law; that the Covenant for further Assurance could not at all help the Case, where the original Conveyance was void; that if a Man covenant to stand seized to the Use of a meer Stranger, and covenants to make further Assurance, this Covenant depending upon the Nature of a Convey-

Saturday,
October, 6,
1717. J. G.
in Court
A Convey-
ance of Cu-
stomary
Lands, to a
Natural
Daughter,
without ob-
serving the
Custom,
void.

ance, if it were void, the Covenant which is only auxiliary, and goes along with the Estate, must be void too. And this was a Copyhold which could not be affected, even by a Judgment at Law; much less by a Covenant which could not bind the Heir at Law of the Copyholder: That in a Case of *Kettle and Thompson*, in the Time of my Lord *Somers*, 'twas held, That a Man was not obliged to provide for his Grandchild as he was for his Children, which were then said to be in Nature of a Debt upon him; and as he was obliged to pay his Debts, so this was a Debt of Nature which he was likewise obliged to pay, but not to his Grandchildren, much less to a Bastard-Child! But my Lord Chancellor seemed not to be satisfied, and said, That by the 43 *Eliz.* a Man was obliged to provide for his Grandchildren; but as to the Point in Question, the Court was of the same Opinion, for the Reasons before given, and dismissed the Appeal from the Rolls. And as to the Proviso at the Foot of the Admittance, 'twas held repugnant and void, according to the Case in *Cro. Car.* or *Cro. Jac.* and the Distinction taken in 4 *Co.* 25. *Kite cont. Quainton.*

Jacobson versus Peer Williams.

Sat. Nov. 9,
1717. J. G.
in Court.
Where a Legacy given to the Wife on a Contingency, &c. vests in the Husband.

A Legacy of 1000 *l.* was given to one after the Death of her Mother, when she should attain the Age of 21 Years: The Defendant was appointed Trustee for the Raising and Payment thereof out of certain Lands: The Devisee was drawn into an improvident Match whilst she was very young, with one who soon after became a Bankrupt; and the Plaintiffs were Assignees under the Commissioners of Bankrupts, and brought this Bill for the Portion which the Husband was entitled to in Right of his Wife: 'Twas insisted by the Defendant, that the Plaintiffs could be in no better Condition than the Husband himself would have been if he had brought this Bill for the Portion; that if the Husband had brought such a Bill, the Court would have taken Care to have made a Provision for the Wife thereout; and as the Portion was in the Hands of the Trustees, the Plaintiffs who stood in the Husband's Place could be in no better Condition, but must submit to make a Provision for the Wife likewise. It was likewise insisted, that this was not vested in the Wife: but her Mother was still living, and she herself under Age, so that it was but a double Possibility in the Wife, and consequently no more in the Husband, and then it could never pass by this Assignment to the Plaintiffs. My Lord Chancellor having taken Time to consider of it till this Day, was of Opinion, that this was not a Portion vested presently in the Daughter, payable at a future Time, but was subject to a double Contingency, the Death of the Mother, and her own surviving, and attaining the Age of 21 Years; first, that the Portion never vested, being given to her only when she should attain 21 Years after the Death of her Mother, was not presently payable at that Time; and that tho' both the Contingencies had now lately happened, viz. the Death of her Mother, and that the Daughter had attained her Age of Twenty-one; yet those being since the Assignment

of

of the Bankrupt's Estates; and since a Certificate of his having conformed himself in every Thing to the Acts, he was now, by the Opinion of my Lord Chancellor, discharged as a Bankrupt; and this Portion could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined, and at an End.

Legatt *versus* Shewell.

ARTICLES of Agreement on Marriage were made, whereby the Husband was to leave his Wife 2000 *l.* at his Death, and to settle on her a Rent-Charge of 100 *l.* *per Ann.* out of Lands to be purchased, with Clause of Distress: The Marriage takes Effect, and the Husband having made no Purchase, nor any Settlement of the 100 *l.* *per Ann.* on his Wife, makes his Will; and therein taking Notice of the Articles; devises the 2000 *l.* to his Wife, and devises the Residue of his Personal Estate to Trustees in Trust, to lay out the same in the Purchase of Lands, to be settled in such Manner as should be devised for securing the 100 *l.* *per Ann.* to the Wife for her Life in the first Place, and subject thereto to the Use of the Plaintiff, his Nephew, and the Heirs of his Body, with several Remainders over, and dies: And now the Plaintiff brings this Bill, and prays to have an Account of the Personal Estate, and that the same might be paid to him on giving Security to answer the 100 *l.* *per Ann.* to the Wife for Life; in Regard, as he suggested, that if such Purchase were actually made, yet he being Tenant in Tail thereof, might, by a Common Recovery, cut out those in Remainder, and make himself Tenant in Fee; and it being about this Time held to be but reasonable to avoid the Expence and Trouble of a Common Recovery, 'twas sent to a Master to take the Account; and the Plaintiff was forthwith to enter into a Recognizance to the Master of the Rolls and the senior Six-Clerk, for securing of the 100 *l.* *per Ann.* to the Wife for Life, which he did accordingly, and for some Years after paid the 100 *l.* to the Wife; but after that, he let it run in Arrear for several Years, and refus'd to pay it any longer, unless the Wife would allow him to deduct for Taxes; and the Wife not only refusing that, but insisting likewise to have Interest for the Arrears incurring since the Recognizance, it came now before the Court upon the Master's Report of all this Matter Specially: And two Questions were made, 1st, Whether this 100 *l.* was to be subject to Taxes? 2^{dly}, Whether the Arrears should carry Interest? As to the first, the Court was clear of Opinion, that this 100 *l.* *per Ann.* not issuing out of Lands, but secur'd only on the Personal Estate, and consequently the Nephew himself being charged with no Taxes to the Crown, should not be allowed to deduct for Taxes, for that would be directly giving him so much Money out of the Annuity, without any Reason or Consideration whatsoever; for as he himself paid no Taxes in Respect of the Personal Estate, there was no Colour to allow him any Deduction in Respect of Taxes, for by the continuing it still a Personal Estate he saved every Year so much Money, which if the Land had been purchased he must have paid:

Nov. 24, 1717.
J. G. at Lord
Chancellor's
House, before
Mr. Baron
Price.

Marriage Ar-
ticles to leave
a Provision
for the Wife

1710. as
appears
by the
Registers
book &
W. Malcom
W. Rogers
of this ch.

Deduction
for Taxes,
allowed or
not.

+ J. C. 1. Bro.
Parl. C. 316.
p. 2. 1. 1. 1.
616.

Interest for
Arrears.

paid : And as he had the Benefit of being free from Taxes, so ought the Annuitant too ; and a Case was cited of *Green versus Green*, where one gave Bond for Payment of an Annuity for Life : And afterwards, for better securing of the Annuity, purchased several Shares in the *New-River Company*, and charged them with the Payment of this Annuity : And though these Shares favoured of the Reality, yet because the original Security was Personal, no Deduction was allowed for Taxes, no more ought there to be in this Case, when the Security is only Personal, and the Nephew himself never charged with Taxes ; but when Lands came to be purchased pursuant to the Articles, the Annuity must then be subject to a proportionable Deduction for Taxes. As to the second Point, it was decreed, That the Recognisance being in Nature of a Bond, the Arrears were a Debt secured thereby, and so must carry Interest from the Time they became respectively due, *ex relatione Magestri Stroud*, who said, That several other Cases were cited, where an Annuity, secured only out of a personal Estate, should not be liable to Taxes.

Anonymus.

Monday,
Dec. 11. 1717,
J. G. at Lord
Chancellor's
on Exceptions.
To what
Time a Judgment,
by the Statute of
Frauds, &c.
shall relate.

T WAS held by my Lord Chancellor, that upon the Statute of Frauds and Perjuries, a Judgment shall have no Relation but from the Time of signing, not only as against Purchasers of the Lands themselves, but also against prior Judgments entered in the grand Session of *Wales*, to which that Statute does not extend ; and therefore, as objected, the Judgment in the *Common Pleas*, though subsequent in Time to the other Judgment at the grand Sessions, yet if it might relate to the first Day of the Term, it would take Place of the other Judgment : But my Lord Chancellor said, a Man who trusted his Money on a Judgment, was in some Sort a Purchaser of the Land, and he might take out Execution, and extend the Land itself ; and therefore if he found no Judgment prior to this, he thought his Security good, and that the Rule the Statute had laid down for the Safety of Purchasers of Lands themselves, was a good Rule to follow in the present Case, and that Relations were not to be favoured in a Court of Equity : But Sir *Thomas Powis* insisted strongly, That the Statute extended only to Purchasers of Lands ; and therefore said, a Judgment should have the same Relation still that it had at Common Law against a voluntary Settlement, or against any one who came to the Lands by any Conveyance without valuable Consideration ; and this was not deny'd by the Court ; but in the present Case, if the subsequent Judgment in the *C. B.* should have such Relation, it would defeat real Creditors who trusted to the Priority of their Judgments, which the Chancellor thought ought not to be overthrown by a Fiction of Law.

Marshall versus Frank & ux.

ONE having Issue a Daughter by his first Wife, who was dead, and being possessed of several Messuages for a Term of 999 Years, makes a Mortgage of them for securing the Sum of 100 *l.* and after, on his second Marriage, gives Bonds to Trustees, to leave his intended Wife 200 *l.* at his Death; then the Marriage takes Effect, and the Wife being possessed of a Leasehold Estate, the Husband, in Consideration of his Wife's having joined with him in the Sale and Disposition of her Leasehold Estate, and also in Consideration of the Delivery up of the Bond, by Indenture of Lease and Release, grants, bargains, sells, and demises his own Leasehold Estate to Trustees and their Heirs, to the Use of himself and his Wife, for their Lives, and the Life of the Survivor of them, Remainder to the Heirs of the Wife, and Covenants, that he was seised in Fee; then the Wife dies without Issue: But before her Death, she makes a Writing, in Nature of a Will, and thereby devises the Premises so settled on her, to the Plaintiff and his Heirs; and the Plaintiff got a Release from the Heir at Law of the Wife: The Husband after, on the Marriage of his Daughter with the Defendant *Frank*, enters into Articles, whereby he agrees to settle and convey the Premises on the Defendant and his Wife, and their Issue; and the Defendant afterwards having Notice of the first Settlement, pays off the Mortgage, and takes an Assignment of the Mortgage Term; and this Bill is brought by the Plaintiff, as Devisee of the Defendant's Mother, to have a Redemption of the Term, and the Benefit of the Devise; the Defendant pleaded the Articles made on his Marriage, that he was a Purchaser for valuable Consideration, and had no Notice of the said Settlement, but would not swear this Plea, so the Plea being over-ruled, and his Title being set forth by Way of Answer as before, 'twas now insisted for the Defendant, that admitting any Thing passed by the Lease and Release to the Mother, under whom the Plaintiff claimed, yet that was only a voluntary Settlement, and therefore ought not to take Place against the Defendants, who were Purchasers for a valuable Consideration; and as they pretended, without Notice, though this was not sworn; that the Settlement was voluntary, appeared from its being made after Marriage; and the Consideration of the Wife's having joined with the Husband in the Sale of her Estate was nothing; for that being only Leasehold, the Husband had absolute Power to dispose of it without her, and therefore her Concurrence or Consent no Consideration; and as to the delivery up of the Bond, that was now out of the Case, she dying before her Husband. But secondly, it was insisted, That nothing at all passed by the Settlement; for it being only a Term in Gross, no Use passed to the Trustee by the Statute of 27 *H. 8.* which only raises the Use when a Person is seised; that by the Lease for a Year, which was only a Bargain and Sale, no Use passed; and there was no Attornment to vest it as a Reversion; and the Release being to enure upon it by Way of Enlargement of Estate, if nothing passed

Feb. 10, 1717.
J. G. in
Court.
Marriage A-
greements.

Voluntary
Settlements.

A Release
cannot operate
on a void
Release.

Or Will.

passed by the Lease, if no Possession was transferred by that, then there was no Estate whereon the Release could operate ; and whatever Consideration it might have in Equity to create a Trust, 'twould not affect the Defendants, who had both Law and Equity on their Sides : Law, by an Assignment of the Legal Interest from the Mortgagee, and Equity, as Purchasers for valuable Consideration : That besides the Estate settled on the Mother being only a Term for Years, the Limitation to her Heirs was void : And admitting it had been good, yet she was under Coverture, and had no Power whatsoever to make a Will, and consequently, the Devise to the Plaintiff thereof was void ; and then the Release of her Heir at Law could have no Operation, nor had he any Interest in him to Release ; and then the Term went to the Husband, he surviving his Wife, and consequently his Settlement must take Place ; that the Husband was the only Person intitled to take out Administration to the Wife ; and therefore admitting this Settlement should pass the whole Interest in the Term, yet the Husband might at any time take out Administration to his Wife, and thereby intitle himself to it. On the other Side it was insisted, that the Plaintiff had actually taken out Letters of Administration to the Wife ; and though he had not Letters of Administration in Court, yet it being sent to the Master, to enquire whether the Lands comprized in the Articles made on the Daughter's Marriage were the same which were mentioned in the Mother's Settlement, there being some Reason to doubt it, the Court left the Plaintiff at Liberty to produce his Letters of Administration before the Master ; and my Lord Chancellor was of Opinion, That either by Virtue of such Administration, and by the Devise of the Wife's, operating as an Appointment, or by the Release of the Heir at Law of the Mother, by some or one, or all of these Ways, the Plaintiff ought to be let into a Redemption of the Term : For though the Settlement could not operate as a Lease and Release, yet the Husband being in Possession, and not the Mortgagee, and there being the Word *granted* in the Release, it took Effect as a Grant or Assignment of his whole Interest at Common Law ; and though it would not go to the Heirs of the Wife, yet his Intention being plain to exclude himself from the whole Interest of that Estate, he should not be afterwards admitted to derogate from it ; and therefore it should not vest in those in whom by Law it ought, which was the Administrator of the Wife ; for as the Husband intended to divest himself of the whole Fee, if it had been a Fee, there was no Reason when it appeared to be a less Interest, that this should not pass ; and therefore he was of Opinion, the Defendants ought to Assign on Payment by the Plaintiff of Principal and Interest, but sent it before the Master to enquire as to the Lands.

Hewett *versus* Ireland, &c.

ONE *William Stringer* being seized in Fee of an Estate, in Right of his Wife, and having Issue only one Daughter, who was about the Age of 10, *Stringer* and his Wife entered into an Agreement with the Plaintiff for the Sale of his Estate, and that out of the Purchase Money, 600*l.* should be secured as a Provision for the Wife and Children, and Conveyances were executed to the Plaintiff accordingly; and the 600*l.* Part of the Purchase-Money, was secured by Way of Mortgage on the purchased Estate in this Manner (*viz.*) 30*l.* a Year, the Interest thereof was to be paid to *Stringer* the Husband, during his Life; and after his Death, to the Wife for Life; and after their Deaths, then the Interest to be paid to such Daughter or Daughters as shall be begotten between them, till they shall attain their Ages of 21 Years, or be married; and then the said Principal Money of 600*l.* to such Daughter or Daughters, equally between them: And in Case there shall be no such Daughter or Daughters, then to the Wife, in Case she shall survive the Husband; but in Case he shall survive her, then to the Husband, his Executors, and Administrators. The Defendant *Ireland* intermarried with the Daughter, which *Stringer* and his Wife had before the Settlement, and in Consideration of this 600*l.* made a Settlement on her, the Daughter died in 1708; and in 1715 the Mother died; *Ireland* took out Letters of Administration to his Wife, and by Virtue thereof, claimed the 600*l.* *Stringer* the Husband claimed the 600*l.* as surviving his Wife; and there was no other Issue, save only this Daughter, and she was born 10 Years before the Settlement. And now the Plaintiff brought his Bill, in the Nature of an Inter-pleading Bill, to know to which of the Defendants he might with Safety pay the Money: And it was decreed for the Defendant *Ireland*; for 'twas said, it could never be the Intent of the Settlement to provide for a Daughter, which probably might never be in *Esse*; and to leave a Daughter who was then about 10 Years of Age, who had never done any Thing to disoblige her Parents, and was wholly unprovided for, without any Provision at all, although the Words seem to have a future Relation from the Time of the Settlement, yet the Intent was only futurely as to those which should be begotten at the Death of the Father and Mother; that this Daughter came in within that Construction, yet it was like a Limitation to one, and his Issue, *procreatis* or *procreandis*; that if it were *procreatis*, it would take in those born after; if *procreandis*, those born before: So here the Intention was never to exclude this Daughter; and consequently the Defendant, as her Administrator, is intitled to it; and it was decreed accordingly with Costs.

A Provision for the Wife and Children out of the Wife's Estate.

Q. If *Stringer* the Husband was not also dead, and so this Claim made by his Executor or Devisee: For otherwise, what Right can the Defendant *Ireland* have to either the Interest or the Principal during his Life: For the Interest is expressly limited, to be paid to *Stringer* for his Life, and not to the Daughter or Daughters, till his Death: But perhaps

it was to know to whom he should hereafter pay the Principal.

Jones *versus* Nabbe.

Monday,
May 19, 1718.
J. G. in
Court.
This Court
restrains the
Election, Li-
berty, and
Discretion of
Trustees and
Executors.

Note.

A Daughter deposits 180 l. in the Hand of her Mother the Defendant, and afterwards makes her Will in Writing, and thereby devises several Legacies, and makes her Mother Executrix, but takes no Manner of Notice of the 180 l. Afterwards, by Word of Mouth, she desires her Mother to give this 180 l. to the Plaintiff, if she thought fit, and then soon after dies. The Mother proved the Will, and then this Bill was brought against her, to have the 180 l. paid. The Mother, by her Answer, admits she had such a Sum in her Hands, that her Daughter did make such a Request to her; but she left it to her Election whether she would give it to the Plaintiff; and in this Case it was agreed, That this was not good, as a *Nuncupative Will*, being above 30 l. and not reduced into Writing within six Days after the Speaking, as that Statute requires. Secondly, That if the Defendant had insisted on the Statute of Frauds and Perjuries, the Court would not have relieved the Plaintiff as upon a Trust: But in this Case, the Defendant having by Answer confessed the Trust, there was no Danger of Perjury from the Variety of Witnesses, which was the Mischief the Statute intended to provide against; and therefore the Court took it to be in the Nature of a Trust, and decreed for the Plaintiff; for the Defendant expressly swore she did not think fit to give it to the Plaintiff, and that the Testator had left her at Liberty: But this Decree was against the Opinion of several at the Bar, who thought it too hard on the Election left in the Mother; but the Court principally relied on the Case of *Kinsman contra Kinsman*, where a Man devised away an Estate of 2000 l. *per Annum* and upwards from his Son and Heir to a Bargeman, and by his Will devised to his Son 20 l. *per Annum*, with this Clause, that if he behaved himself well, and gave no Trouble or Disturbance concerning his Will, then he might make it up 80 l. if he thought fit. In that Case the Court decreed the 80 l. *per Annum* to the Son, against the Devisee; but it was purely upon the Circumstances and Hardship of the Case: But in the present Case 'twas said there was no Circumstances or Ingredients of Hardship on the Plaintiff. But query; for it seems to be a Trust in the Hands of the Mother.

Warner and Horn.

Wednesday,
May 21, 1718.
J. G. in Court.

Tenants in
Common.

Thomas Glauwin being possessed of several Leasehold Houses for several Terms for Years, makes his Will, and thereby devises his said Leasehold Houses to Ann his Wife for her Life; and after her Death I give and devise the same to Allice Buinion and her three Sons, to be equally amongst them; and it was decreed, That they took as Tenants in Common, though there was no Mention of any Division to be made, or equally to be divided between them: Accordingly the Plaintiff, who was Administrator of Allice Buinion, and had brought this

this Bill for Account of the Profits, had a Decree for an Account of the fourth Part of the Rents and Profits for the Time to come.

Bradburn versus Woodcock.

ONE *Isaac Hawkins*, an Attorney, being seized of a very considerable Real Estate, and also possessed of a considerable Personal Estate, and having only three Daughters, dyed about the 28th of March, 1713, whereby about 150 *l. per Annum* descended to each of his Daughters; and their Shares of the Personal Estate came to about 1100 *l.* a piece. One of his Daughters was married in his Life-time to one Mr. *Brown*, of *Burton upon Trent*, a Gentleman of about 900 *l. per Annum*, to whom the Defendant was Curate, and had a Power of granting Licences, and such like Things, from the Chancellor of the Diocese; the Plaintiff was Clerk to Mr. *Hawkins* at the Time of his Death; and had so far carried on a private Amour with Mrs. *Mary Hawkins*, the second Daughter, that she had some Kindness for him; but the Plaintiff was a Man of no Fortune at all. In a Day or two after the Death of *Isaac Hawkins*, the Plaintiff applied himself to the Defendant, and acquainted him with his having Affection for Mrs. *Mary Hawkins*, and desired him to grant him a Licence for their Marriage; whereupon the Defendant represented the Obligations he was under to *Brown*, who had married one of the Sisters; that he was not only afraid of forfeiting his Favours by granting of such Licence without first acquainting him with it, but that he might be also in Danger of Prosecutions in the Spiritual Court, and be put to great Trouble and Expences thereby: Upon which the Plaintiff offered to give him a Note of 500 *l.* to indemnify him from any Expence he might sustain on that Account; and accordingly the Plaintiff prevailed upon him to take his Promissary Note for Payment of 500 *l.* on Demand, for Value received; and thereupon the Defendant told the Plaintiff, that though he did not then grant the Licence, yet he'd go along with him to the young Lady, and so far secure her to him, that he should be in no Danger of losing her; and accordingly about 10 o' Clock that Night, the Plaintiff and Defendant went together to the House of the late *Hawkins*, and after the Defendant had discoursed with the young Lady in private, she and the Defendant came out to the Plaintiff, and by the Influence of the Defendant, she consented to join Hands with the Plaintiff, and the Defendant pronounced some Words of Contract between them, and after that was over, exhorted her to continue faithful to her Engagement, and to remember the solemn Promise she had made; but at the same Time represented the Danger and Difficulty he should be under of solemnizing the Nuptials in a Publick Manner, and therefore he desired them to forbear any further Thoughts for about six Weeks, in about which Time he might have an Opportunity of breaking it to Mr. *Brown*, and obtaining his and his Lady's Consent, and seemed averse to any further Proceedings therein at that Time; but in a few Days after, the Plaintiff repeating his Importunities to the Defen-

Eod. Die.

On a Marriage - Brokage Note, &c. given to a Parson.

Defendant, to grant him a Licence, the Defendant told him he should have Occasion for 300*l.* and that if he would let him have it, he would let him have a Licence, and do the best Offices he could for them, towards compleating the Marriage; whereupon the Plaintiff told him he had not such a Sum of Money, nor could tell where to borrow it; but if the Defendant would recommend him to any Person that would lend him that Sum, he would be obliged to him, and give his Bond for the Re-payment of it: Thereupon the Defendant recommended him to one Mr. Brougham, whom he thought might furnish him with the Money; and accordingly the Plaintiff applied himself to Mr. Brougham, and acquainted him with the Occasion of his Desire to borrow that Money, and proposed to give his own Bond for the Re-payment of it; upon which Mr. Brougham told him, That as it was on so good an Occasion, he might get the young Lady to be bound with him likewise, and that then he should have the Money; and accordingly the Plaintiff acquainted the young Lady with it, and prevailed on her to become Bound with him to Mr. Brougham, for the Re-payment of this Money; and thereupon Mr. Brougham paid him down 200*l.* and promised to let him have the other 100*l.* next Morning; upon which the Plaintiff went forthwith to the Defendant, and gave him the 200*l.* and got a Licence from him presently; and the next Morning, about 7 o' Clock, the Plaintiff, the young Lady, and the Defendant came to the Church, where they staid till about 8 o' Clock, and then the other 100*l.* being brought in a Bag, the Defendant, without counting it, put it up, and the Marriage was thereupon solemnized the 8th of April, which was about ten Days after the Father's Death, and no more: The young Lady, as was proved in the Cause, was of full Age at the Time of her Father's Death; and there was likewise a strong Proof that Mr. Brown was not averse to the Marriage, but only thought it too soon after the Father's Death, and was desirous, for the Sake of Decency, to have it deferred for some Time longer; but that the Defendant, in order to have this Money, had raised Difficulties and Scruples: And now, after three Years Acquiescence, this Bill was brought to have the 500*l.* Note delivered up, and the 300*l.* Note re-paid. The Defendant, by his Answer, confessed most of the Facts before stated; but insisted, that the 300*l.* was given him freely and voluntarily of the Plaintiff's own accord; but as to the 500*l.* Note, he submitted to deliver up that; and it was urged, That this 300*l.* was not given for any Service he was to do, for that the young Peoples Affections were engaged before, and he was never made acquainted with it till the very Night they came to him for a Licence; that this was not in the Nature of Marriage Brokerage, but was purely voluntary on the Plaintiff's Part. *Quere quid inde Venit?*

Note. *This Case may hint to us the Necessity there is of having the Sacrament of Marriage administered by the Civil Magistrate. W. B.*

Targett *versus* Grant.

A Man possessed of a Farm for 31 Years, devises it to his only Son *Henry*, during his Minority, and if he attains to his Age of 21 Years, then to him during his Life, if the Term shall so long continue, and no longer; after his Death, to such of his Issue to whom he shall devise it for the Residue of the Term; and if he dies without Issue, and without making any Disposition of the Residue of the Term, to *A.* The Testator dies, *Henry* after dies without Issue, and without making any Disposition of the Residue of the Term. *A.* enters, and the Plaintiff was Lessee under him, and the only Question was, Whether upon the Words of this Will, the whole Interest did not vest in *Henry*, and consequently in the Defendant his Representative? And 'twas decreed for the Plaintiff; for the Words *die without Issue* have a twofold Meaning; without Issue, at the Time of his Death, or without Issue, whenever that Issue fails; and in Cases of Inheritance, if Lands are devised to one, and he *die without Issue*, the Devisee takes an Estate tailed by Implication, which shall go to his Issue; and they shall take in Course of Descent to all succeeding Generations; but to make such Construction, in Case of a Term, which cannot come to the Issue by Descent, is unnecessary; and therefore in such Case, the other Construction of the Words, which is most natural and obvious, shall take Place; and it shall be intended, if he die without Issue living at his Death, and consequently the dying without Issue, being confined within the Compass of a Life, hinders not the Limitation over; but it may very well take Place by Way of Executory Devise, according to the former Resolutions in like Case, and cited the Case of *Loddington and Kime*, 3 Lev. 431. and decreed that the Devise was good.

Saturday,
May 24,
1718, J. G.
in Court.
The Effect of
the Words,
die without
Issue, &c. in
a Devise of
the Residue
of a Term.

Executory
Devise.

Atwood *versus* Atwood.

IN this Case it was held by the Court, that a Wife can't either by herself, or *procchein amy*, bring a *homine replegiando* against her Husband, for he has by Law, a Right to the Custody of her, and he may, if he think fit, confine her, but must not imprison her, if he does, 'twill be good Cause for her, to apply to the Spiritual Court for a Divorce, *propter sevitiam*. But the Nature and Proceedings in a Writ *De homine replegiando*, are such as cannot be maintained by a Wife against her Husband.

Monday,
May 26,
1718, J. G.
in Court.
No *Homini*
Repleg. by a
Wife against
her Husband.

Spence versus Allen.

Thursday
June 19,
1718, J. G.
in Court.
New Inter-
rogatories
ordered, on
suppressing
the old.

IN this Case the Interrogatories, and the Depositions of a Witness taken on them had been suppressed, for that the Interrogatories were leading, and then Publication passed; and now the Court was moved, that a new Sett of Interrogatories might be drawn and settled by the Master, for the Examination of this Witness, whose Evidence was very material, and yet must be wholly lost, if the Court would not indulge them this Way; And though the Practice has been always against it, and 'twas insisted to be of dangerous Consequence, yet one President being produced to this Purpose, and the Interrogatories which had been suppressed, were such as might have been drawn by many other Council, without any Apprehension of their being leading; the Court, to let in the Party to the Benefit of this Witness's Testimony, ordered new Interrogatories to be settled by a Master, and put in for his Examination over again.

Wright versus Pilling.

On a Mortgage, &c.
That a Judgment-Creditor may secure himself, by taking in a Prior Mortgage, as in the Case of Mortgages.

ONE Cockcroft being possessed of a Term for Years, determinable on the Death of his Wife, the 16th of April, 1694, borrows of the Defendant the Sum of 40 l. and the 18th of July, 1704, he borrows of the Defendant a further Sum of 83 l. and gives him Bond for both in Hill. 1704. The Defendant obtains a Judgment on his Bond against Cockcroft, but before he had taken out Execution, viz. the 7th of March following, Cockcroft mortgages his Term to the Plaintiff, who was an Attorney, who had been concerned for him as such, in several Causes, and had expended several Sums of Money for him therein, which are mentioned to be the Consideration of the Mortgage; and on the 10th of the said Month, purchases the Equity of Redemption; on the 23d in the same Month, the Defendant takes out a *feri fac.* on his Judgment, and this Term was sold thereon by the Sheriff to one Harri-*sc.*, but this was in Trust for the Defendant; after which, the Defendant having Notice, that there was an old Mortgage standing out, which was made the 21st of July, 1699, he takes an Assignment of that Mortgage; and also takes an Assignment of a Judgment, which one Sparks had obtained some Years before against Cockcroft, and for the Mortgage he paid 144 l. and on the Judgment about 30 l. and the Plaintiff having brought his Bill against the Defendant, had a Decree at the Rolls, to be let into the Redemption, on Payment only of what he had paid for the Assignment of the Mortgage, for that, as 'twas held, he could not so tack his own Judgment, and the Judgment of which he had taken an Assignment, to the Mortgage, as to withhold the Term from the Plaintiff, who had not only a Mortgage, but had now purchased the Equity of Redemption also; and the Defendant thinking himself aggrieved by this Decree, did now appeal from it; and 'twas argued

argued for him, that he ought to hold this Term, 'till both his Debts were satisfied; that 'twas like the Case of a third Mortgagee buying in the first, that he might hold out the second Mortgagee, 'till his whole Money satisfied. That the Plaintiff was an Attorney, and the whole Consideration of his Mortgage and Purchase was made up of Bills of Costs, and for Business done, that his Deeds in Truth were antedated, and that there was little or nothing due to him.

On the other Side, 'twas argued by Mr. *Vernon*, that the Difference had been always taken between a general Incumbrance, as by Statute or Judgment, and a Purchaser or Mortgagee; that the one was no Lien, nor any particular Part of the Estate, but affected it only at large; whereas in Case of a Mortgage or Purchase, the Party contracted for that particular Part, that if a Man had confessed 20 Judgments or Statutes, the last could not by buying in the first, hold out all the intervening Judgments, &c. which the Court agreed to be so, because, when the Plaintiff on the first Judgment was paid, that Security determined and expired of itself; and Mr. *Vernon* said, he had always taken the Course to be, that a Judgment Creditor could not always mend or better his Security, by taking in a prior Mortgage, and cited the Case of Sir *William Basset* to that Purpose; and he liken'd it to the Case of a Dowress, which must take as the Law gives it; but a Jointress contracts for the very Estate itself; that this was but a Term for Years, and therefore not affected by the Judgment, 'till the *feri facias* lodged in the Sheriff's Office, which was not done 'till the 23d of *March*, long after the Plaintiff's Mortgage and Purchase; and this was the stronger, because *Cockcroft* had not the legal Interest of the Term in him neither, that he had only an equitable Interest in it, at the Time of this Execution taken out; and though the Sale of the Term might in Equity pass that Interest, yet it ought not to hurt the Plaintiff, or hold him out, who was a Prior Purchaser; that there was no Proof of Antedate, nor did it appear, that the Consideration of the Plaintiff's Purchase was made up as the Defendant pretended; but at last, the Defendant offering to go before a Master, and to pay him all that he could prove to have really paid, or to be really due to him, together with Interest and Costs; the Plaintiff was advised to comply with it, and to turn his Purchase into a Mortgage, which he consented to; and so the Cause went off. But my Lord Chancellor, and several at the Bar, seemed not to agree to the Distinction taken by Mr. *Vernon*, but thought a Judgment-Creditor might as well secure himself, by taking in a Prior Mortgage, as a third Mortgagee; for that his Judgment was a Lien on the Land, and when he gets in a Prior Mortgage, that ought not to be taken from him, 'till Payment of his whole Debt; and in this Case one Question was, Whether on the Appeal, the Party might be admitted to read any Thing he had not proved on the first hearing? And my Lord Chancellor was of Opinion that he might, for that as he said, 'twas to be enrolled as his Decree, and the Appeal was, to give him only an Opportunity of hearing what could be offered, only why

On an Appeal from a Decree. New Matters admitted to be read, not formerly in Proof.

he should not enroll it as his Decree : And therefore the Cause was entirely open, and the Party at Liberty to offer what he could, against his signing and enrolling the Decree.

Angier versus Angier.

Friday,
June 27,
1718, J. G.
in Court.
Wife sues
here for se-
parate
Mainte-
nance, &c.

THE Plaintiff brought this Bill by her *prochein amy*, against the Defendant her Husband, for a special Execution of Articles, whereby the Defendant was to allow her 52 *l. per Ann.* separate Maintenance. It appeared in the Cause, that the Plaintiff brought 1200 *l.* Portion to the Defendant, who was a Hop Merchant, and lived in *Southwark*, and was a Man of good Credit and Business; but soon after Marriage, such Differences rose between them, that it became impossible to live any longer together; on the Plaintiff's Part 'twas proved, that the Defendant had several Times beat and abused her, that he had whipt her with a Horse-Whip, tore her Headcloaths, and deny'd her Necessaries; on the Defendant's Part 'twas proved, that the Plaintiff was a Woman of a most perverse, morose and malicious Temper; that she would suffer none of the Defendant's Friends or Relations to come to the House; that she had oftentimes affronted the Defendant's Father (who, as 'twas proved in the Cause, was a Man worth 20,000 *l.*) and Mother, that she did all she could to vilify and expose the Defendant; that she chose to wear the dirtiest Cloaths she had, though it was proved the Defendant kept a very plentiful House; that he allowed the Plaintiff even to Superfluities; that he had made her Presents of fine Cloaths, a Gold Striking Watch, and several other Ornaments; that the Plaintiff was addicted to drinking Brandy, and other strong Liquors to Excess; that she was guilty of the most provoking and disdainful Behaviour possible towards her Husband, and that at last, she left him for about two Months, after which, she libell'd in the Spiritual Court for Separation and for Alimony; and whilst the Cause was there depending, the Defendant entered into the Articles in Question with one *Abel*, in Behalf of the Plaintiff, whereby the Defendant agreed to allow his Wife 52 *l. per Ann.* separate Maintenance, and to permit her to live where she thought fit, without any Molestation or Disturbance from him; but the Defendant being desirous to have his Wife home again, and to come to a Reconciliation with her, had for some Time withdrawn the Payment of this Allowance, which was to be 20 *s.* a Week; therefore to have the Arrears for the Time past, and the growing Payments during the Time of their Separation, this Bill was brought. The Defendant insisted, the Plaintiff was not entitled to the Assistance of this Court, for carrying these Articles into Execution; that to decree that, was to decree a Separation, which was the Business only of the Spiritual Court; that Alimony continued no longer than 'till they became reconciled, and consented to cohabit; but if these Articles be decreed to be executed, no Reconciliation afterwards could set them aside; that the Wife in this Case was not at all bound; that the Articles were only signed by *Abel*, and not by her; and therefore 'tis unrea-

sonable

sonable the Husband should be fast and the Wife loose; but 'twas argued on the other Side, that these Articles ought to be carried into Execution; that they were intended to supply the Sentence in the Spiritual Court, and to prevent the Charge and Trouble of a solemn Litigation there; that the Husband by entering into them, had given Sentence against himself, to allow his Wife this Alimony; that after such Allowance, the Husband could not be charged even at Law for any Debts of his Wife, that the Husband and Wife were often considered in this Court as separate Persons; that though this Court could not decree Alimony, yet it might decree Execution of Articles, according to the Parties own Agreement; and several Precedents had been in this Court to that Purpose, as Sir *James Oxendon* and his Lady, and a Case of *Cutting and Cutting*, and several other Cases. My Lord Chancellor was of the same Opinion, and said, to decree an Execution of Performance of these Articles, was not to invade the Jurisdiction of the Spiritual Court; that the Intent of these Articles was to save the Expence of a Sentence in the Spiritual Court; that if these Articles could not be decreed here, they could be of no Force any where; that there was no Remedy upon them at Common Law, for there the Wife could not sue her Husband; that it could not be pretended the Spiritual Court had any Power to decree a Performance of them; that where a Husband makes a separate Provision for the Wife, he is not chargable at Law for her Debts; but though that were so, yet to avoid the Expence he might be put to in defending such Suits, he sent it to a Master, to settle a Security to indemnifie him against the Wife's Debts, and decreed the Arrears and growing Payments of the 52 *l. per Ann.* to be paid to the Wife, and said, this was not a Decree for Alimony, or to decree a Separation between them; for that they might, whenever they thought fit, come together again, and then the Articles would be no further binding.

Walsam against Skinner.

IN this Case, it was agreed by the Council on both Sides, that an after-born Child should come in with the rest as to their Customary Shares of a Freeman of *London's* Personal Estate. Secondly, 'twas agreed as an undoubted Rule, That where a Freeman died intestate leaving a Wife and Children, that one Third of his Personal Estate, and the Widow's Chamber, was to go to the Wife, and one Third to the Children, and the dead Man's Third to go according to the Statute of Distribution, viz. two Thirds to the Children, and the other one Third to the Wife; and that this dead Man's Third was not at all under the Controul of the Custom. *Quod Nota.*

Note, *The Author of these Reports was in Ireland, during the 5th, 6th and 7th of George I. See the additional Cases at the End hereof.*

Tuesday,
July 1, 1713,
J. G. in
Court.
Custom of
London
Cyphanage.

Brown *versus* Marsh.

Whether on
the Statute
3 & 4 *Annæ*,
c. 9.
The want of
Confide-
ration of a
Promissary
Note,
can be given
in Evidence?

Statute
3 & 4 *Annæ*,
c. 9.
of Promissary
Notes.

THIS was a Motion for an Injunction, and the Case was, a Note was given by the Defendant as Trustee for the Executrix of *Fowler*, for some Share in the *Affiento* Brass and Copper Mines to the Plaintiff *Brown*, who was an original Undertaker in setting on Foot that Bubble. And here it was very much disputed, whether the Plaintiff should be left to Law upon this Note; for that these Mines were a meer Bubble, and had no Existence in *Rerum Natura*; and *Fowler* was an innocent Person, that only sold the Shares that he had bought, and the Plaintiff was the Original Undertaker of the Project. In this Case, it was very much disputed, whether the Defendant could give any Thing in Evidence, to shew that the Note wanted a Consideration: The Court was equally divided, and two Judges were of Opinion, that upon Promissary Notes, the Want of a Consideration could not be given in Evidence; for the Words of the Statute of 3 and 4 *Annæ*, Cap. 9. touching Promissary Notes are, "That all Notes in Writing, that after the first Day of May, Anno Dom. 1705, shall be made and signed by any Person or Persons, Bodies Politick or Corporate, or by the Servant or Agent of any Coporation, Banker, Goldsmith, Merchant, or Trader, who is actually intrusted by him, her, or them, to sign such Promissary Notes, for her, or him, or them, whereby such Person or Persons, Bodies Politick or Corporate, his or their Servant or Agent as aforesaid, doth or shall promise to pay to any other Person or Persons, Bodies Politick or Corporate, his or their Order or Bearer, any Sum or Sums of Money, mentioned in such Note, shall be taken and construed to be by Virtue thereof due and payable to any such Person or Persons, Bodies Politick or Corporate, to whom the same is made payable." The two Puisne Judges were therefore of Opinion, that since the Statute made it payable by Virtue of the Note, that the Consideration of the Note was not enquirable, no more than the Consideration of a Bond; and on a Bond, the Defendant can only plead *non est factum* in a Court of Law, and if it were sealed and delivered, which were the only Solemnities of contracting, appointed by the Law, nothing could be given in Evidence, touching the Consideration.

The other two Judges thought there was a great Difference between a Note and a Bond, notwithstanding the Statute; for in the Case of a Bond, where there were Solemnities of contracting, viz. the Sealing and Delivery, if there was no Consideration, yet if there was no Fraud in obtaining the Bond, the Money was a Gift in Law to the Obligee; but the Note was no more than a Simple Contract, and notwithstanding the Statute says, that the Money shall be due and payable by Virtue of the Note, that only makes the Note itself Evidence of the Consideration, which it was not before the Statute, as appears by the Case of *Clerk versus Martin*, and *Potter versus Pearson*, 1 *Salk.* 129. But tho' the Note itself be Evidence of a Consideration, yet it is not conclusive Evidence, but turns the Proof upon the Defendant to shew that there was

was no Consideration given for such a Note ; and so he can shew that it is still but a Simple Contract, and therefore but a *Nudum pactum unde non oritur actio*, and of this Opinion was my Lord Chancellor King, and moved to rule it so at *Nisi Prius*.

But in this Case, an Injunction was granted on Terms, the Defendant agreeing to give Judgment, with a Release of Errors subject to the Order on Hearing. Injunction granted.

Note, This Matter was very much disputed in the Hall, and this Case was put, that if *A.* forged a Bank Note, and gave it as a Consideration to *B.* for *B.*'s Note ; or if *A.* should have given Brass Money for his Note, could not this want of Consideration be given in Evidence? If not, *A.* might recover against *B.* where there was no Debt ; and certainly the Statute did not design that a Man should recover, where there was no Debt at all ; for the Statute only makes Promissary Notes, as Bills of Exchange ; and though the Acceptor and Indorser were bound to pay those Bills, whether they had received any Consideration or not, because the Acceptor accepts it for the Honour of the Drawer, and the Indorser negotiates it ; yet the Drawer of the Bill was not obliged to pay it to the Person, in whose Behalf the Bill was drawn, unless he had paid him a Consideration ; but the owning a *Value received*, was Evidence *prima facie*, that a Consideration was paid to the Drawer of the Bill. *Vid.* 1 Salk. 125. 4 Mod. 242, 244.

Keen versus Stuckely. In Dom. Procer.

THIS was an Appeal from the Decree of the Court of Exchequer, and the Case was, that the Respondent being seized in Fee of a Messuage 24 Acres, and three Roods of Meadow and Pasture in *Holbeck*, in the Fens of *Lincolnshire*, did by Articles of Agreement, dated the 20th of *July*, 1720, bargain and sell the same to the Defendant, and did truly agree, that he would on or before the 29th of *September* then next ensuing, at the proper Costs and Charges of the Appellant, make to him, his Heirs and Assigns for ever, a good Estate in Fee Simple, to the Satisfaction of the Appellant, and his Council ; and the Appellant did by the said Articles promise and agree, that on such Assurance and Conveyance made and executed, he would pay to the Respondent 800 *l.* being 40 Years Purchase. A Bill was exhibited in the Exchequer by the Respondent, for a specifick Performance of this Agreement, which was decreed.

A specifick Performance of an extravagant Agreement, for a Purchase decreed.

It being proved in the Cause, that the Respondent had left his Deed with the Appellant, and that there was no just Objection to his Title ; this was admitted below in the Court of Exchequer ; and therefore the Proofs were not read there, nor were they marked as read. Proofs not read, because the Title was admitted.

Two Points were argued in this Case, before the House of Peers.

First, Whether an exorbitant Bargain for 40 Years Purchase, should be carried by the Decree of a Court of Equity into Execution, or whether they should be only left to their Damages at Law.

This was a very doubtful Point among the Lords, for on the one Side 'twas argued, that if a Bargain and Sale was unconscionable, the

Person

Person who had got such a Bargain, was not to demand a Performance of it in a Court of Equity, but he could only demand Damages for not performing the Bargain; for the Court of Equity was only to assist to carry conscionable Bargains into Execution, and where they did not find them fit to be carry'd into Execution, the Court of Equity was to leave them to Law.

On the other Side 'twas said, that a Man was obliged in Conscience to perform a Bargain, though it was a hard one; and where he was obliged in Conscience, it was no Hardship upon him to be compell'd thereto; that nothing in the World was more uncertain, than the Price of Land; for Land may be worth 40 Years Purchase to one Man, that was worth but 20 to another: But this Point was left doubtful.

The Respondant's Title, though admitted below, not allowed by the Lords, because the Proofs of it had not been read.

But they all agreed in the second Point, *viz.* that since the Title was not made out by the 29th of September, as the Respondent undertook by his Covenant, there was no Occasion to determine the other great Point; for the Respondent not having proved, that he had made out the Title by the Time covenanted, could not entitle himself to the Purchase Money; and the Proofs for this could not be read, because they were not read in the Exchequer, and the Appellants Admittance of that Matter was not entered.

S. C. Com. 310.

Butler versus Gastrill.

N. B. This Case seems to be before the Delegates.

The marriage was with the first wife's niece according to Comyns.

Prohibition to the Spiritual Court, in the Case of an incestuous Marriage, &c. A Marriage with the first Wife's Mother's Sister, is incestuous.

Where a Prohibition lies, and why.

John Butler and *Elizabeth* his Wife, obtained a Prohibition to *Peregrine Gastrill*, Judge of the Ecclesiastical Court at *Chester*, where they libell'd against the Plaintiff for an incestuous Marriage; for that the said *John Butler* had married the Plaintiff *Elizabeth*, formerly *Elizabeth Lowndes*, who was Sister to the Mother of *Hannah Lowndes*, his first Wife; and upon this Prohibition, the Defendant put in a Demurer, and the Defendant now argued for a Consultation; and here the only Question was, whether the Marriage with the Wife's Mother's Sister was incestuous or not; and it was resolved by the whole Court, that this Marriage was incestuous; and here in the first Place,

This Position was agreed to be plain, that by the Statute of the 38 Hen. 8. cap. 13. if a Spiritual Court proceeds to impeach or dissolve a Marriage out of the *Levitical* Degrees, that then the Temporal Courts are to prohibit them; for by that Statute, all Marriages that are out of those Degrees, are declared to be good and lawful; and therefore, if the Spiritual Court molest Persons, in doing that which is declared lawful to be done by the Statutes of the Realm, they are by the Temporal Courts to be prohibited, because they exceed their Jurisdiction thus bounded by the Temporal Law; but where the Law has not bounded them, their Jurisdiction still continues; and therefore, within the *Levitical* Degrees, they are still Judges of Incest.

The Incest within the *Levitical* Degrees is twofold; viz. either such as is contrary to the Law of Nature, or such as is forbidden by the divine positive Law.

First, The Incest against the Law of Nature : And that is any Marriage between the ascending and descending Line in *Infinitum*. This is contrary to the Law of Nature, because it tends to the Destruction of the natural Will of the Creator, which designed the Preservation and Continuance of such Inhabitants of the World, as he originally created ; and all Acts of Men that tend to the Destruction of such Species, as Murder of an innocent Person is said to be against the Law of Nature ; and therefore Incest between the ascending and descending Line, is contrary to the Law of Nature : For the Mother would never have preserved and educated the Female Issue, if it had been admitted to the Father to have had Access to them : And Fathers would never have educated and preserved their Male Issue, if they might have ascended the Bed of the Mother. And therefore this Horror of Incest has been propagated, not only in all Civil Societies, where Nature is trained up and cultivated, but also in the Clans of the *Scythians* and *Nomades*, and all the wild People of the Earth, where Men have lived in Troops, by Spoil and Rapine, without any regular or settled Government. There is another Reason likewise, why this is called unnatural ; and that is, because it destroys the natural Duties between Parents and Children ; for the Parent could never preserve or maintain that Authority that is necessary for the Education and Government of his Child, nor the Child that Reverence that is due to the Parent, in Order to be educated and governed, if such indecent Familiarities were admitted or set up upon a Foot of Equality one with the other.

Incest contrary to the Law of Nature.
1st, In Lineals.
Causa, ex Consequenti, satis est Sapienti.

Secondly, Of Incest among Collaterals. And that is not, strictly speaking, contrary to the Law of Nature : For then Mankind could not have been propagated from one Common Stock without a Breach of the Law of Nature. Besides, that this very Usage of marrying Sisters was practised by the Patriarchs and good Men of Old, without any Note of Blame, as *Jacob* married *Rachel* and *Lea* ; nay, there is one Case wherein 'tis expressly commanded, and that is where the elder Brother dies without Issue, that the younger Brother must marry the deceased Brother's Wife, to raise up Seed unto his Brother : The Meaning of which is, that the Children begotten by such second Marriage, were to bare the Brother's Name, and take his Inheritance. But though Incest among Collaterals is not contrary to the Law of Nature, yet 'tis contrary to the positive Law of God, which is likewise established upon very strong Reasons : For if a Concourse between Brothers and Sisters might be allowed, or their Marriages to be tolerated, the Necessity that there is that they should be educated together, and the frequent Opportunities they have with each other, would fill every Family with Lewdness, and create Heart-burnings and unextinguishable Jealousies between Brothers and Sisters, where the Family was numerous, and 'twould confine every Family to itself, and hinder the propagating of common Love and Charity among Mankind ; because there would be a Danger of taking a Wife out of any Family, if

2dly, In Collaterals.

Vide Selden de uxore Hebraica, &c.

Contrary to the Law of God. Q.

*En argutum
dictum,*

*Ratio ab-
fracta.*

The 3d De-
gree of Col-
laterals pro-
hibited.

Women were liable to be corrupted by such vicious Freedoms. They have likewise found among Brute Creatures, *that it is necessary to cross the Strain in order to continue the Species.* It may be that there being the same Tone and Figure in the Blood, and a similar Conformation of Vessels, the Circulation of it becomes torpid and unactive; whereas a new Mixture of others of the same Kind, where there is a different Figure and Motion of the Blood and Spirits, may add a new Vigour and Ability to the animal OEconomy, which may be likewise a natural Reason against such Sort of Incest.

This Prohibition is likewise carried into the third Degree in the collateral Line, and is to Uncles and Aunts, Nephews and Nieces; because upon the Death of the Father and Mother, they come into the Education of the Children, *loco Parentum*, and by Consequence it was necessary to propagate the same Reverence of Blood, in such near Degrees, that the Uncle might have the same Regard and Command as a Father, and a Neice the same Duty as a Daughter. It was also necessary, in Order to perfect the Union of Marriage, that the Husband should take the Wife's Relations, in the same Degree, to be the same as his own, without Distinction, and so *vice versa*: For if they are to be the same Person as was intended by the Law of God, they can have no Difference in Relations, and by Consequence, the Prohibition touching Affinity, must be carried as far as the Prohibition touching Consanguinity: For what was found convenient to extinguish Jealousies amongst near Relations, and to govern Families and educate Children amongst People of the same Consanguinity, would likewise have the same Operation amongst those of the same Affinity.

And when we consider who are prohibited to marry by the Levitical Law, we must not only consider the meer Words of the Law itself, but what from a just and fair Interpretation may be deduced from it: For the Law, in *Leviticus, Cap. 18. Ver. 6*, begins, *That none of you shall approach to any that is near of Kin, to uncover their Nakedness.* Now who are next of Kin must be understood by the Examples from the 6th to the 20th Verse.

And there are Examples of many Prohibitions to Collaterals in the third Degree, both in Affinity and Consanguinity; but there is no Example of Collaterals in the fourth Degree, either in Affinity or Consanguinity; and therefore the Law of Marriage opens to Relations in the fourth Degree, and the Jewish Lawyers, in computing their Degrees, computed them according to the natural Order of Things; that is from the Propositus up to the Common Stock, and so down to the other Relations, which is the fair and natural Order of computing Proximity. And in this Manner of Computation, all Marriages of Collaterals, in the third Degree, are unlawful, and all Marriages in the fourth Degree, are lawful.

This perfectly agrees with the Resolutions of our own Law. Thus the Marriage with the Wife's Sister's Daughter is incestuous, which is the same Degree with this Marriage. *Moor, 907, Cro. Eliz. 228, 4 Leon. 16, Man's Case*: So the Marriage with the Sister's Daughter is declared incestuous, which is likewise in the third Degree. The Case of *Watkins and Margatton, Raym. 464*. And 'twas likewise resolved in the Case of *Wortley against Watkinson*, that the Marriage with the

the Wife's Sister's Daughter was Incestuous, 2 Lev. 254. So 3 Kebl. 660. So resolved in the Case of Sir Edward Whitpool, quoted in Hob. 181. So the Marriage of the Wife's Sister's Daughter was resolved to be incestuous in the Case of *Snowling versus Nursey*, 2 Lutw. 1075. So the Marriage of two Sisters, one after the other, was held incestuous, in the Case of *Hill and Good*, being in the second Degree. *Vaugh.* 302.

But the Marriage with the Wife of the Plaintiff's Great Uncle was allowed to be good, because that was in the fourth Degree; and by the Words of the Statute, 32 H. 8. Cap. 38, Cousin Germans are declared of the fourth Degree, to have Liberty to marry. 2 Vent. 9, 10, &c. *Vaugh.* 206.

This likewise was the antient Sense of the Christian Church, and even of the Church of Rome, in the Time of Pope Gregory: For in Writing to *Austin*, Bishop of Canterbury, he says, *in quarta Generatione Contracta Matrimonia minime solverentur*. And this appears in the Decretals, *Cans.* 33. *Quest.* 4. *Cap.* 20. but afterwards when they found that Dispensations for Incestuous Marriages brought great Profit to the Church of Rome, and knowing it had obtained universally in the Christian Church, that it was lawful to marry in the fourth Degree, Pope Alexander II. began a new Computation of Degrees, and he said, that the secular Computation, which was the Computation of the Civil Law, was not properly adapted to the Decisions touching Incestuous Marriages; but they ought to compute up to the Common Stock, where the Relation joined, because there the Blood was connected; and therefore they computed the Degrees according to the Distance of the Person remotest from the Common Stock: For according as the remotest was distant from the Common Stock, so they computed the Relations between the Parties. This plainly appears by the Decretal, *Lex.* 33, 1. No. 3, 4, 5, 6. And in the 6th, the whole *Arbor consanguinitatis* is set forth; so that the first Cousins that are in the fourth Degree, by this former Computation of Degrees, which was the received Computation in the *Mosaick* Law and in the *Roman* Government, were now by the Canonical Computation thrown into the second Degree; and by this alteration of Computation of Degrees, they forbade not only first Cousins, but second Cousins and third Cousins to marry, unless they obtained Dispensations.

The Intention of our Statute was to restore every Thing according to the Prohibition expressed in the Law of God; and plainly the *Levitical* Computation of Degrees was in the Manner they computed in the Civil Law, which was from the Propositus up to the Common Stock, and so down again to the other Relations. And by the Canons confirmed by *Jac.* 1. in 1603, the 99th Canon expressly saith thus, *No Person shall marry within the Degrees prohibited by the Laws of God, and expressed in a Table set forth by Authority in the Year of our Lord 1563; and all Marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the Beginning; and the Parties so married, shall, by the Course of Law, be separated; and the aforesaid Table shall be in every Church publickly set up, and fixed at the Charge of the Parish.* And it appears by that Table, that to marry the Wife's Mother's Sister is incestuous. Indeed it has been duly objected to this Manner of Argumentation, that the Canons bind

blind only Ecclesiastical Persons, and don't bind the Laity, because they are made only by the Clergy in Convocation, and so they only are bound by these Rules; and Laymen are not bound, because such Canons have not the Assent of the Commons and Temporal Lords; and so such Canons cannot bind the Laity as a Law: But to this I answer, That these Tables do shew the Sense of the Church of *England*, and so are a proper Exposition of the Law of God, and by Consequence ought to have great Weight with the Judges when they expound the *Levitical* Law, and they are plainly the Decision of this Reformed Church, touching the Crime of Incest; and they do retrench the exorbitant and unwarrantable Constructions of the Church of *Rome*, who made the Law of God of none Effect by their Traditions; and yet they expound the Law of God in its full Latitude, and forbid Marriage only to such Persons as are in equal Degree to those mentioned in the 18th of *Leviticus*. And so a Consultation was awarded.

Consultation.

Countess of Coventry versus Earl of Coventry & al.

*J. L. Macmillan in Eq. at
the end of 9. Nov. 12. 10.
Mod. 463.*

Lord Chan-
cellor, Jek-
hill, Price,
Gilbert.

Marriage Ar-
ticles, in Con-
sideration of
a Portion
paid, deemed
a Purchase,
and a Con-
veyance de-
creed.

S. G. Maxf.
Equity.

Equity Abr.
348.

Cases in Law
and Equity,
12.

Thomas late Earl of *Coventry*, being seized in Fee of several Manors, Lands and Hereditaments, in several Counties of *England*, some in Possession, and some other Part in Reversion, expectant on the Death of *Thomas* Lord *Deerbursf*, his eldest Son, of the Lady *Anne* his Wife, and of Earl *Gilbert* his second Son, (the Plaintiff's late Husband) without Issue Male, by his Will, dated the 24th of *March*, 1698, gave several Parts of his Estate therein particularly mentioned, to his Wife *Elizabeth* for Life, and after her Decease, to Trustees and their Heirs, to the Use of his first, and other Sons, by his then Wife in Tail Male; Remainder as to Part, to the Use of his Son *Gilbert* for Life, and his first and other Sons in Tail Male; Remainder to his Son the Lord *Deerbursf* for Life, with like Remainder to his first and other Sons in Tail Male; Remainder to *Francis Coventry* for Life, with like Remainder to his first and other Sons; Remainder to the Defendant, the present Earl of *Coventry* for Life, and to his first and other Sons, with other Remainders over; and as to the other Parts of his Estate, so devised to his Wife for her Life; to the Use of his Son the Lord *Deerbursf* for Life, with Remainders to his first and other Sons in Tail Male, with the like Remainders to Earl *Gilbert* and *Francis Coventry*, and the now Earl, for their Lives, and their Sons in Tail Male, with Remainders over; Remainder to his own right Heirs.

He also devised to his said Trustees, and their Heirs, divers other Manors and Estates, which he had in Possession and Reversion to the Uses following, viz.

As to *Woolston*, *Sinfield*, *Edgware*, *Griffe*, *Cotten* and *Woolvey*, to the Use of his first and other Sons by his first Wife in Tail Male, Remainder to his Son, Lord *Deerbursf*, for Life, with Remainder to his first and other Sons in Tail Male, with Remainder as to *Woolston*, *Sinfield* and *Beaul*, to the Use of *Gilbert Coventry* for Life, with Remainder to his first and other Sons in Tail Male, with Remainder to his own right Heirs, &c. And as concerning the said Manors of *Edgware*, *Griffes* and *Woolvey*, to the Use of *Francis Coventry* for Life;

Re-

Remainder to his first and other Sons in Tail Male, with Remainder to the Defendant, the present Earl of *Coventry* for Life, and to his first and other Sons in Tail Male, with Remainders over; Remainder to his own right Heirs; and as to his Manors of *North-Littleton*, *South-Littleton*, *Offenham*, *Berlingham* and *Defford*; other Parts thereof in Possession, to the Lord *Deerbursf* for Life, with Remainder to his first and other Sons in Tail Male; Remainder to the Use of his Son *Gilbert*, and his Sons in Tail Male; Remainder to the first and other Sons of the said Earl *Thomas*, by his then Wife; Remainder to the Use of the said *Francis* for Life, and his Sons in Tail Male; Remainder to the Defendant, the now Earl, for Life, and his Sons in Tail Male, with several Remainders over, with Remainder to his own right Heirs.

In which Will it is provided, that it should be lawful for any Person or Persons, who should at any Time then after, by Virtue of the said Will, or any Codicils to be annexed thereto, be seized of any the Testator's Manors or Lordships, Lands, Tenements, or Hereditaments, by any Writing or Writings under his or their Hands and Seals, to limit and appoint any such Manors or Lordships, (except those of *Great and Little Milton*, and all such other Manors, where there are any Copyhold Estates) and any of the said Messuages, Lands and Hereditaments, not exceeding the yearly Value of 500 *l.* to any Wife or Wives, such Person or Persons should happen to marry; for her or their respective Life or Lives, for her or their Jointure or Jointures, so as such Person or Persons should have with such Wife or Wives, upon such Marriage, a Portion equivalent for such Jointure; and after making other Provisions in his said Will, the Testator appointed his Wife Executrix, and died without Issue by her, who afterwards married *Thomas Savage*, Esq; and is still living.

Thomas Lord *Deerbursf*, afterwards Earl of *Coventry*, died, leaving the Lady *Anne* his Widow, and two Sons, , who both died without Issue, and Earl *Gilbert* became seized thereupon of several Manors and Lordships, devised by the said Will, and upon a Treaty of Marriage between Earl *Gilbert* and the Plaintiff his second Wife, Articles of Agreement, dated the 23d of *June*, 1715, were made between Earl *Gilbert* of the first Part, the Defendant *Sir Strensham Masters* and the Plaintiff his only Daughter of the second Part, and the Defendants *Mr. Leigh* and *Mr. Williams* of the third Part; whereby in Consideration of such Marriage, and of 10,000 *l.* the Plaintiff's Marriage Portion, paid down by *Sir Strensham Masters* to the said Earl *Gilbert*, he the said Earl *Gilbert*, for himself, his Heirs, Executors and Administrators, did covenant, promise and agree to and with the said *Sir Strensham Masters*, his Heirs, Executors and Administrators, and to and with every of them, by the said Articles, in Manner and Form following, that is to say, that he the said *Gilbert*, Earl of *Coventry*, or his Heirs, should and would at any Time, after the Solemnization of the said intended Marriage, at the Request of the said *Sir Strensham Masters*, his Heirs, Executors, or Administrators, but at the proper Costs and Charges of the said *Gilbert*, Earl of *Coventry*, his Executors or Administrators, according to the Power given to him, the said Earl of *Coventry*, for that Purpose, by

the last Will and Testament of the Right Hon. the late Earl of *Coventry*, bearing Date on or about the 24th Day of *March*, in the Year of our Lord 1658; or otherwise, by good and sufficient Conveyances and Assurances in the Law, well and sufficiently convey, settle, limit and appoint, or cause, or procure to be conveyed, settled, limited, or appointed, Manors, Messuages, Lands, Tenements and Hereditaments of the full and clear Value of 500 *l. per Ann.* unto or upon the said *Anne Masters*, for and during her natural Life, for her Jointure, to commence and take Effect in Possession, immediately from and after the Death of the said *Gilbert*, Earl of *Coventry*, in Case the said *Anne Masters* shall him survive, as by the said *Sir Strensbam Masters*, his Heirs, Executors, or Administrators, or by his or their, or any of their Council, learned in the Law, shall be reasonably devised, advised or requir'd; and also that his Heirs, Executors or Administrators, should, after his Death, pay her 250 *l. per Ann.* during her Life, as an Addition to her Jointure half yearly, free from Taxes.

And 'twas further agreed, that Earl *Gilbert* should deposite 5000 *l.* Part of the 10,000 *l.* in the Bank of *England*, or invest it in Exchequer Notes, carrying Interest, and deposite them in a Box or Trunk, to be locked up with three Locks, upon Trust, that the Defendants *Leigh* and *Williams* should lay out the 5000 *l.* in the Purchase of Lands, and to settle them to the Use of the said Earl for Life, with Remainder to Trustees, to preserve contingent Remainders; and after his Death, to the Use of the Plaintiff for Life, to be with the Manors and Lands of 500 *l. per Ann.* aforesaid, and the said Annuity of 250 *l. per Ann.* in full, for her Jointure, and in Bar of her Dower, with other Limitation to the Use of younger Children of their Marriage, and in Default of such Issue, to the Use of the said Earl *Gilbert*, his Heirs and Assigns, as therein is mentioned, with a Power in the Trustees, until a Purchase made, to put out the 5000 *l.* at Interest, to be applied as is therein directed.

The Marriage took Effect, and the 10,000 *l.* Marriage-Portion was paid, and 5000 *l.* Part thereof was vested in Bank Bills, and after lent on a Mortgage, pursuant to the said Articles; and Earl *Gilbert*, soon after his Marriage, gave Direction to his Steward, to find out proper Lands for a Jointure, and the Steward, according to Order, perused the Family Settlement, and could find no other Estate, than the Manor of *Woolvey*, which was free from Incumbrances, or which was within the said Earl's Power to settle, and the said Manor being of little more Value than 400 *l. per Ann.* the said Earl paid off a Mortgage upon Lands in *Woolston*, and agreed to make up the 500 *l. per Ann.* out of those Lands, and accordingly, at the Request of *Sir Strensbam Masters*, caused a Settlement by Way of Lease and Release, dated the 5th and 6th of *July*, 1719, to be prepared, which was agreed to by all Parties, and approved of by *Sir Strensbam*, and actually engrossed; wherein, after Recital of Earl *Gilbert*'s Power by the said Will, and of the Articles, the said Earl *Gilbert* is therein mentioned, to limit and confirm unto *Sir Strensbam*, and Mr. *Leigh*, their Heirs and Assigns, the said Manor of *Woolvey*, and several Lands in *Woolston*, therein particularly mentioned, of the Value of 500 *l. per Ann.* and the said Earl after expressed his In-

tention

tention to execute the said Settlement, but by his sudden Illness, whereof he died, and the Absence of the Steward, in whose Custody the said intended Settlement was at the Time, and many other unforeseen Accidents, set forth in the Pleadings, the same was not executed before his Death.

Earl Gilbert died without Issue Male, leaving by Dorothy his first Wife, the Lady Anne, now the Wife of Sir William Carew, his only Daughter and Heir; but before his Death, made his last Will in Writing, dated the 27th of October, 1719, and thereby *inter alia*, gave the Defendant (besides what was agreed to be settled on her by the Marriage-Articles) 3000 *l.* and several specifick Legacies, and made his said Daughter, the Lady Anne Carew, his sole Executrix, who has since proved the Will, and taken upon her the Execution thereof.

The said Francis Coventry also died without Issue Male, so that upon the Death of Earl Gilbert, the Defendant the present Earl of Coventry, became possessed of divers Manors and Estates, under and by Virtue of the Limitations in the said Will, subject not only to the 5000 *l.* Mortgages, but as the Plaintiff insists to the 500 *l. per Ann.* agreed to be limited to the Plaintiff for her Jointure, and the Plaintiff's Bill is to compel the Trustees in the Mortgage to call in the 5000 *l.* in Order to lay it out in a Purchase, and to compel Sir William Carew, to give Real Security for the 250 *l. per Ann.* and to pay the 3000 *l.* Legacy.

And as against the Earl of Coventry, that she may hold and enjoy the Lands contained in the Settlement, intended to be executed for her Life; but in Case the Indenture so engrossed should prove defective, and not amount in Equity to a sufficient Appointment, pursuant to the Power, then that she may have a Satisfaction out of the Earl's Real and Personal Estate.

That on the Hearing of the Cause the 18th of April, 1722, and several Cases being then cited, the Court was pleased to refer it to Mr. Conway, one of the Masters of this Court, to take an Account of the Real and Personal Estate of Earl Gilbert, and how much came to the Hands of any of the Parties who were to be examined on Interrogatories; and the said Master was also to take an Account of the Debts of Earl Gilbert, unsatisfied at his Death, and also of his Legacies, and to state the Real and Personal Assets, and also of his Debts and Legacies, and any other Matter he should find Difficult, especially to the Court; and when the Master should have made his Report, this Cause was to come on again, to be heard thereupon, and also as to the 500 *l. per Ann.* claimed by the Plaintiff upon the said Marriage-Articles, at which Time, (the Court being before attended with the Cases therein cited) would desire the Assistance of some of the Lords the Judges, and the Master of the Rolls, and all farther Directions were reserved, until the Case should come to be heard on the Master's Report.

That the Master had made his Report, and thereby certified, that the Real and Personal Estate of the said Earl Gilbert, amounts to 13,467 *l.* 0 *s.* 9 *d.* over, and besides the 1200 *l.* and Interest due on the said Mortgage of Woolston, and 3792 *l.* 9 *s.* 7 *d.* paid, and to be paid by the said Sir William Carew, in Discharge of Debts, Legacies and Funer-

ral Expences, besides the Sum of 392 l. 13 s. 7 d. desperate Debts. And the Plaintiffs Demands out of the said 13,467 l. 0 s. 9 d. are as follow, viz. 250 l. Annuity clear of Taxes, Jewels, Furniture, and other specifick Legacies, amounting to 1448 l. 1 s. 7 d. ^{4th} and the Demand of 500 l. *per Ann.* now in Question, with the Arrears thereof, from Earl Gilbert's Death, being four Years and upwards.

Argument
for the
Defendant.

In this Case 'twas argued for the Defendant, that here was no Execution of the Power limited in Earl Thomas's Will, because the Covenant with Sir *Strensham Masters* was, that Earl Gilbert or his Heirs should, and would, at the proper Costs and Charges of the Earl, his Executors, or Administrators, according to the Power in the Will of Earl Thomas, or otherwise, by good and sufficient Conveyances in the Law, sufficiently convey Lands to the Value of 500 l. *per Ann.* and that tho' they could not come to a Court of Equity for a specifick Performance, because there was nothing specifically mentioned in the Covenant, to be set forth as a Jointure, and that the Covenant was to be interpreted as a Personal Covenant, because it was made with *Masters*, his Heirs, Executors and Administrators, either to settle in Pursuance of the Power or otherwise, so that Earl Gilbert had his Election to satisfy the Covenant, either by settling of the Lands under the Power by Appointment, or by limiting any other Lands to the same Purpose; and according to the Circumstances of this Case, he could not be said to have made his Election, because from 1715 to 1719, there was nothing done, nor any Request by Sir *Strensham*, to set out any Parcel of Lands, in Pursuance of the Power; and though about July, 1719, a Draught was prepared to be engrossed, yet that continued to lie by, 'till October 1719, and was never executed; and he had an *Animus deliberandi* continuing, and had not taken hold of the Power, by appointing the Lands of *Woolvey* and *Woolston*, in Performance of the Covenant, since the Indentures were only engrossed, and never executed; and in all Conveyances of this Nature, the *Animus deliberandi* must be supposed to continue, 'till the Act be completely executed; and the Power not being executed, 'twas compared to the Case of *Sangon and Williams*, where Tenant in Tail for valuable Consideration, covenants to sell the Estate Tail and dies; a Court of Equity would not compel the Heir in Tail to execute such a Conveyance, though there had been a Decree against the Tenant in Tail, to levy a Fine, and suffer a Recovery; and so 'twas urged, that since the Remainder was vested, before the legal Estate was executed by Earl Gilbert, the Court would not compel the Remainder Man in this Case, to execute Conveyances in Pursuance of this Covenant; and here they quoted those Cases of Law, that say the Powers that go in Derogation of the Remainders vested, are to be taken strictly, because 'twas looked upon as dangerous for a Court of Equity to overthrow, by their Decrees, the Interest that was originally vested in the Parties, by legal Conveyances, and the rather in this Case, because there was a Personal, and some Real Estate to satisfy the Covenant; and this Covenant is to be considered as a Debt, due from Earl Gilbert, on receiving his Marriage-Portion, and whenever there is any Debt, the Personal Estate shall go in Exoneration of the Real, which is to support the Honour

Honour and Dignity of the Family; and 'twas farther urged, that the Heir being expressly bound in the Covenant, the Estate descended to the Heir, should be first liable; but 'twas answered, and resolved by the Court, that after the Statute 27 Hen. VIII. for transferring Uses into Possession; the Courts of Common Law held, that Powers of Revocation of Estates executed, were to be taken strictly; and so if not pursued, they would not impeach or destroy an Estate already executed by legal Conveyances; but in the Courts of Equity, they soon found that the Construction was too Artificial, and not according to natural Equity, and so they construed those Powers as a Reservation of so much of the ancient Dominion of the Estate, to be under the Controul of the Tenant for Life, & *cujus est dare, illius est disponere*; and as often as any such Dominion is reserved, the Tenant for Life may contract about it, and when a Marriage Contract is made, as this was in Contemplation of the Execution of such a Power, 'twas a Real Lien upon the Estate; for both the Marriage was had, and the Portion paid in Contemplation, that the Charge should be laid upon the Estate, pursuant to the Power; and so a Court of Equity may decree against the Remainder Man, because he claims under the Devise of Earl Thomas, whose Intention 'twas, that such a Charge should be induced on the Land, and the present Earl taking the Estate under the Will, takes it *sub Onere*, so that a Court of Equity may decree the Charge to be made good by the Remainder Man, because 'tis decreeing a Charge in Pursuance of the Intention of the Testator; and Equity, in such Case, was obliged to make such Decree, because the first Provision was made, both for the Honour and Advantage of the Family, since they could not marry according to their Quality, without having a Power to make such a Jointure; and the present Earl takes the Benefit of that Power, by having such a Dominion over the Estate, for his own Advantage, and so is obliged in Conscience to discharge the Intention of the Testator, in the Behalf of Earl Gilbert: And this is not like the Case of Tenant in Tail, for there the Tenant sells, and dies before Docketing the Entail; so that Equity can't relieve, because the Statute binds a Court of Equity, as it does a Court of Law; but if the *Vendee* creeps out of the Statute by a Recovery, the Courts of Equity have never permitted such a fictitious Suit to overthrow the Title of the Heir in Tail; nay farther, if there was a Trust in Tail, and the *Cestuy que Trust* should covenant to convey for valuable Consideration, there the Court of Equity would oblige the Heir in Tail to convey, because this is a Creature of Equity, and out of the Statute; and wherever an Agreement is made, and Money paid, Equity does not consider the Form of Conveyance, but takes it as it was actually intended, in the best Manner that could be construed at Law; for the substantial Part of the Agreement, is the Price, and for that, the Right is transferred, and *what ought to be done, is in Equity looked upon as done*: And so if a Man articted for the Purchase of Land, and after devised all his Estate, it would not pass the Lands in the Articles; and this Distinction was taken, that if it had been a meer voluntary Conveyance, the *Animus deliberandi* should have continued 'till the Conveyance was executed; but here being a Contract

tract to settle in Pursuance of that Power, when an Estate is afterwards set out, it shall be presumed to be an Execution of that Contract, which in Conscience he was obliged to perform, especially in a Case so circumstanced, since nothing can be objected to the Value of the Lands; and in this Case, what the Persons contracting had in Contemplation, was an Estate to be executed in Pursuance of the Power, and the Words *or otherwise*, are to be looked upon as Auxiliary, and to aid the Estate to be conveyed; so that if the Earl had settled or purchased other Lands, in Order to be settled according to the Contract, he might have exonerated the Lands subjected to the Power by Earl Thomas's Will; and since the Real Estate now in Question was mortgaged, 'twas necessary the Covenant should be large enough to bring in all the Real and Personal Estate of Earl Gilbert, in aid of the settled Estate, in Case of Deficiency; and so the Covenant is not to be construed on the one Hand so strictly, as to subject the Heir in the first Place, nor so loosely, as if the Word *Heir* was only Matter of Form, and meerly the Words of the Conveyancer, but the Intention was, that he at his Election should have a Power out of any other Estate to satisfy the Covenant; and after his Death, in Case the Lands contained in the Power should not be sufficient, that all other his Estate should be subject thereto; but since Earl Gilbert did not settle any other Estate, as he might have done to discharge the Contract, it remains as a Real Lien on the settled Estate, in the first Place, to bind the same as what the Parties had in Contemplation to bind the Contract; and this is not like the Cases where Equity decrees that the Personal Estate shall go in Exoneration of the Real, for the Reason of that is, that the Personal Estate is the natural Fund for the Payment of Debts and Legacies; and so as far as that is not specifically devised, it shall exonerate; but the Articles of Earl Gilbert must not be considered as a Debt, but a Conveyance of so much of the Estate, over which he had a Power, because his primary Intention was to convey, and if it be considered in this Light, there can be no Application of the Personal Estate, since there is no Debt, of which the Real Estate was to be exonerated; and that this was the Construction of Powers in Equity, the following Cases were quoted.

Articles in Consideration of, &c. to settle Lands, not to be taken as a Debt; but as a Conveyance or Purchase.

Doctor Sarth versus Lady Blanford.

Per Lord Sommers, 1695.
A Provision for younger Children, is chargeable on the Real Estate.

" *Henry Blanford* settles Lands to the Use of himself for Life, and
" then as to Part to his Wife, for her Life, for her Jointure, then
" to the Issue Male of his own Body, with several Remainders over,
" with a Proviso, that if he should have any younger Children, it should
" be lawful for him by Deed or Will, executed in the Presence of two
" or more Witnesses, to limit and appoint any of the said Lands (except
" those of Jointure) to such Person, and for such Estates as he should
" think fit for raising 500 l. apiece for such younger Children, to be paid
" at such Times, and in such Manner, as he, by such Deed or Will should
" declare, and covenanted to do so accordingly. *Henry* died, leaving several younger Children, but did not make any Appointment. De-
" creed

Term. Pascha, 8 GEORGE I. in Chancery. 1667

" creed this was a Charge upon the Land, and bound the Issue in Tail,
" and ordered the 500 l. apiece to be raised for the younger Children
" immediately.

" *Note*, The Covenant in this Case was looked upon as an Execution
" of the Appointment in Pursuance of the Power.

Lady Clifford versus Bullington.

" **L**ORD Clifford had a Power to settle a Jointure, not exceeding 2 Vern. 379j
" 1200 l. per Ann. on his Marriage with the Plaintiff; he cove- Per Lord
" nants to settle on her 1000 l. per Ann. he sends to his Steward to be Keeper
" informed of a Part of his Lands to that Value, and settles according Wright.
" to the Particular.
" After his Death, it appeared, that the Lands so settled, were but
" 300 l. per Ann. the Bill was against the Remainder Man to have these
" Lands made up 1000 l. per Ann. and 'twas decreed against the Re-
" mainder Man.

Hollingshead versus Hollingshead.

" **A** Man devises his Estate to A. with several Remainders over, with a June 14,
" Power to the Person in Possession, to limit any Part of the Pre- 1708, per
" mises for a Jointure, not exceeding one Moiety; the first Devisee for Cooper
" Life, whilst an Infant marries the Plaintiff, and with his Mother, Chancellor,
" enters into Articles, to settle Lands of 100 l. per Ann. on the Plaintiff
" for her Jointure, but in the Articles, no Notice was taken of the
" Power; and before any Settlement made, pursuant to this Power,
" the Tenant for Life dies.
" The Bill was brought against the Remainder Man, to have the
" Jointure made good, and decreed accordingly.

Allford versus Allford.

" **G**regory Allford, Tenant for Life, Remainder to his first and other At the Rolls
" Sons in Tail; Remainder to Francis for Life, Remainder to his December 5,
" first and other Sons in Tail; Remainder to the Defendant, with a 1709.
" Power for Francis, after the Death of Gregory without Issue, to make
" a Jointure.
" Francis marries in the Life-time of Gregory, and before Marriage,
" covenants to make a Jointure on the Plaintiff, and to execute this
" Power when he should come into Possession.
" Gregory dies without Issue Male, and Francis survives him, but
" dies without making a Jointure, or executing this Power.
" A Bill against the Remainder Man to have a Jointure made, be-
" cause Francis surviving, Gregory might have executed this Power, and
" had covenanted to do so, and 'twas decreed accordingly.

Parker

Parker versus Parker.

June 13,
1714.

" **M** R. *Parker* had a Power to raise 7000 *l.* for younger Children
" by Deed or Will, executed in the Presence of three Witnesses,
" afterwards by Will, executed in the Presence of two Witnesses, he
" charged the Premises with 8000 *l.* for his younger Children, and
" 'twas decreed good for the 7000 *l.*

So that in the principal Case 'twas decreed, that the Plaintiff should settle the Lands of *Woolvey* and *Woolston*, in Pursuance of the Power, and that the Plaintiffs and the Defendants, the Heir and the Lord *Coventry*, should have their Costs out of the Personal Estate, because Earl *Gilbert* ought to have settled during his Life, and the present Earl had only by his Answer, laid his Estate before the Court, and had joined in the Examination of Witnesses, but the Plaintiff had examined only to prove the Allegations of the Bill.

Whitchurch versus Whitchurch.

J. L. 2. P. W. 236.

1. Nov. 619. Jekhyl,
9. Nov. 124. Raymond, C. J.
Gilbert, C. B.
Lords, Commissioners of the Great Seal.
The Construction of the Statute of Frauds, &c. touching Wills, &c. and the disposing of a mortgag'd Term, attending the Inheritance.

E *Edward Strode*, Esq; being possessed of a certain House and Lands, called *Batecomb-Lodge*, in the Parish of *Batecombe*, in the County of *Somerset*, for the Remainder of a Term of 500 Years, in Trust for one *James Bisse*, who was seized of the Reversion of the Premises in Fee Simple, and *Bisse* having borrowed 350 *l.* of *Edward Whitchurch*, since deceased, the said *Strode* and *Bisse* by Indenture, dated the 20th of *March*, 1694, assigned the said Term to the said *Edward Whitchurch*, to secure the Repayment of the said 350 *l.* and Interest, by the said *Bisse* unto the said *Edward Whitchurch*; after which, the said *Bisse* borrowed of the said *Edward Whitchurch*, the further Sums of 100 *l.* and 103 *l.* which together with the former Money due on the Premises, and the Interest due for the same, amounted to 600 *l.* and which were all charged upon the Premises.

July 1, 1697.

By Indenture, dated the 1st of *July*, 1697, reciting 627 *l.* to be then due; *Bisse* in Consideration thereof, and of a farther Sum of 173 *l.* lent to him by the said *Edward Whitchurch*, ratified the said Term to the said *Edward Whitchurch*, redeemable on the Payment of 824 *l.* and by Indenture of the same Date, granted and demised the Premises to the Defendant *Jonathan Whitchurch* for 200 Years, from thenceforth in Trust, for the said *Edward Whitchurch*, as a collateral Security for the said 824 *l.*

December 21
and 22,
1703.

Biss by Indenture of Lease and Release, dated the 21st and 22d of *December*, 1703, conveys the Inheritance of the Premises to *Seaman*, in Consideration of the Sum of 1356 *l.* 14 *s.* 6 *d.*

June 3 and
4, 1705.

Seaman by Indenture of Lease and Release, dated the 3d and 4th of *June*, 1706, conveys the Inheritance of the Premises to *Edward Whitchurch*, in Consideration of the Sum of 1510 *l.* 15 *s.*

And

And afterward *Edward Whitchurch*, by a Will of his own Hand Writing, but not published in the Presence of Witnesses, gave unto *Edward Whitchurch*, sen. all these Lands and Premises, called *Batecomb-Lodge*, to him for Life; Remainder to the Defendant *Edward Whitchurch*, jun. in Tail Male, and made *Joseph Whitchurch* Executor of his Will, and died without Issue, leaving the Plaintiffs his Heirs at Law, being Daughters of his Brother *James Whitchurch*.

The Question is, Whether this Will, that has conveyed the Lands in this Form, (that is) to *Edward Whitchurch*, sen. for Life; Remainder to *Edward Whitchurch*, jun. in Tail, be a good Conveyance to pass the same.

The Words of the Statute of Frauds and Perjuries are, *That all Devises and Bequests of any Lands or Tenements, deviseable either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of Kent, or the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor, by three or four credible Witnesses, or else they shall be utterly void, and of no Effect.*

This Devise is within the Letter of the Law; 'tis a Devise of an Estate of Freehold and Inheritance, and so made void by the Statute.

A Devise of a Term is within the Letter, but not within the Meaning of the Law; the Reason is, because Terms would go to the Executors, and a Will without these Solemnities, would constitute Executors, in whom a Term for Years would vest, and so such Wills might dispose of such Terms for Years away from the Executors.

It was not the Intent of the Statute, to alter the Course of Personal Estates;

But whenever Lands would descend to the Heir, the Statute has constituted, that the Will which is to have the Intendment to disinherit the Heir, should be made with the Solemnities of Subscription, and of three Witnesses.

Now this Will is designed to disinherit the Heir, and alters the Course of Descent, since there is a Devise for Life, with a Remainder in Tail to other Persons.

If there had been no Devise, the Estate must have descended to the Heir, and the Descent of the Inheritance would have carried the Term along with it, and it would be drawn down by the Descent to the Heir at Law, as an Appendix to the Inheritance.

Can a Will made void by the Statute, alter the Descent of the Inheritance, or cut off the Term from the Inheritance, so that he who has a Property in the Inheritance, shall not have a Property in this Term?

A void Will is as no Will at all, and if there had been no Will, the Inheritance had descended to the Heir, and the Term along with it.

But 'tis said, that the Term not being merged, and that the Person having the Inheritance and Term both in him, though the Will will not be good to pass the Inheritance, yet 'twill be good to pass the Term at Law, since the Term was not merged in the Inheritance, and he that had the Dominion over both, has by this Instrument in Writing,

shewed his Intention to dispose of it. And so such Intention, according to natural Justice, ought to take Place, especially against his Heir, who is to be considered only as a Voluntier.

Answer.

The true Distinction is what has been already laid down, that a Will without the Solemnities of Subscriptions or Witnesses, will alter the Condition of the Executors; but it can't alter the Condition of the Heir, because the Heir is not constituted by the Will, but disinherited by it.

So that 'till the Solemnities are compleated, the Will *quoad* the Heir is only in *fieri*; and if in *fieri*, still remains under Deliberation, 'till those Solemnities are compleated.

And that is the Construction of all solemn Instruments, that 'till they are compleated by their proper Solemnities, they remain under the Deliberation of the Parties.

And so 'twould be a strange Construction, that this Will, which was only a Preparation, and was still under Deliberation, whether he should disinherit his Heir or not, should be construed actually to disinherit him, by taking away the Term, which would have gone along with the Inheritance.

Nobody will say, that though this Mortgage Term was merged, that yet it would have gone to the Executors; for when a Mortgagee purchases the Equity of Redemption, the Land ought to be governed by the Rules of the Real Estate, it becomes a Real and inheritable Property, it is no longer a Personal Property, nor to be governed by Rules belonging to Chattels only.

If it should be considered sometimes as Real Estate, and sometimes as Personal, be sometimes governed by one Set of Rules, and sometimes by another, and the Courts of Equity might despotically, or for various Motives, change it from one Channel to the other; I am afraid it would make Things too Arbitrary, and Properties would be brought into Confusion.

But however that be, 'tis plain in this Case, that the Term was connected to the Inheritance at the Time of the Devise, and had there been no such Devise, a Court of Equity would have carried the Term along to the Heir, and not have suffered it to go to the Executor.

Shall not the Court so act by the same Rules, when the Statute has made it void? The Court of Equity that is bound by the Statute, must surely look upon it as no Devise in Prejudice to the Heir, since it has not the legal Solemnities required by that Statute.

But 'tis said, that *Edward Whitchurch* having the Dominion of this Estate, he has shewed his Intention to pass it to his younger Brother and Nephew, and it would be against natural Justice, not to make such a Construction, as would comply with his Intention.

I think this Reason is against the Policy of all Civil Laws, which provide against Constructions of this Kind.

For all Solemnities in conveyancing, are appointed to hinder the Parties from Surprise, and so, though the Party's Intention is never so strong, yet 'till he has perfected the Instrument according to the Solemnities required by the Law, the Intention goes for nothing.

All

All such Laws as have been appointed to restrain the natural Dominion, have been very restrictively construed, because Solemnities that are appointed, are to hinder Frauds and Perjuries, in the Proof of improper Instruments, and hindering the Party himself from Surprise.

Indeed a Feoffment without the Solemnity of Livery, would anciently amount to a Covenant to stand seized, but that was where a Price was paid, and so the Party was under an Obligation of Conscience, specifically to perform the Contract, and to transfer with Solemnity; but it is not so in the Case of a Will, where the Conveyance is meerly gratuitous, nothing passes by the meer Intention, 'till the Party has conveyed it with the legal Solemnity of Subscription and Attestation.

There was no Will of Lands at Common Law; Wills came in by the Invention of Uses, which is a Creature of this Court, and when these Uses had supplanted the Tenures, then by 27 *Hen. VIII.* they thought to abolish them, and to turn the Use into Possession. q.

Yet they thought it convenient to leave a Liberty of devising; and so by the 32d of *H. 8. Cap. 8.* they gave them leave to devise their Soccage Lands, and two-thirds of their Knight Service Lands; but no particular Solemnities were appointed but by writing only.

This created a great Inconvenience, for there was much Perjury in setting up of Wills; and so they thought it necessary to constitute legal Solemnities, by the Subscription and Attestation of Witnesses; and Sir *Matthew Hales* and Sir *Lionel Jenkins*, who prepared this Statute, chose to take the Plan of a Roman Law: For though the old Civil Law required seven Witnesses, yet after that, the Constitution of the Emperor *Leo, Tit. 41.* reduced it to five, and in all Country Villages to three; and so they took the Constitution of the Civil Law, as it stood relaxed by those Constitutions.

The Court of Equity has always construed Trusts to be within the Statute.

And in the Case of *Tiffen and Tiffen*, 2 *Ch. Cas.* 49, 50. and in the Case of *Langhton* 156, they would not divide the attending Terms from the Inheritance.

'Tis said that these Terms will pass at Law; but they won't pass unless the Testator designed to sever them from the Inheritance, which is not the Case here.

They won't pass when the Testator plainly intended to pass the Inheritance and not the Term.

They won't pass where they would not go to the Executor; but must go to the Heir if they were undevised.

The breaking of these Terms from the Inheritance by a Will, without Solemnities, would actually be of dangerous Consequence, especially where the Intention is not manifest to do it, and where there is no Necessity for it, either for Payment of Debts, or Portions for younger Children, &c.

This Devise for Life with a remainder in Tail, was only *in fieri*, and the *Animus Deliberandi* continued till the Subscription, and till it was published in the Presence of Witnesses; and so the Statute operates upon it to make it void.

See Feb. 2. P. W. 102. a case relative to the same guardianship, but put in the hands of the

Earl of Shaftsbury versus Shaftsbury.

May 15, 1723,
Jekyl, Gilbert,
and Raymond,
Commissioners.

THE late Earl of Shaftsbury, the Plaintiff's Father, by his Will, dated December 10, 1710, appoints Sir Robert Eyre, Sir John Cropley, and Jasper Stanhope, Esq; afterwards Lord Stanhope, Guardians of the present Earl, till his Age of 21 Years. Sir Robert Eyre preferred his Bill in this Court, and proved the Will, and the Court ordered the same to be performed. Sir John Cropley and Lord Stanhope died; and there happening a Dispute between the Countess of Shaftsbury and my Lord Chief Baron Eyre, concerning the Guardianship, on the 28th of February, in the 9th of the King, the Court declared the Right of Guardianship to be in my Lord Chief Baron, and that nothing should be done in Relation to the Care and Education of the said Earl, without the Direction of my Lord Chief Baron. My Lord Chief Baron, the 22d of March last, preferred his Petition to this Court, setting forth that the Earl of Shaftsbury was married to the Lady Susanna Noel, Daughter to the Earl of Gainsborough, without his Privy or Consent; upon which, and the Affidavits thereunto annexed, the Countess of Gainsborough and Lady Shaftsbury, as likewise the Earl, were ordered to attend; and the Countess of Shaftsbury likewise preferred her Petition to discharge the Order of the 28th of February, in the 9th of the King; and in this Case there have been four Questions made.

1. Whether the Court has Jurisdiction to declare the Right of Guardianship in this Case.

2. Whether the Court could declare it by Petition, or whether it must be by Bill.

3. Whether this be a legal Declaration of the Right of Guardianship; (that is) whether it will survive or not.

4. Whether these Ladies, or either of them, are in Contempt of the Court.

1st Question. First, Whether the Court has Jurisdiction.

Now touching the Wardship at Law, there was a two-fold Jurisdiction.

The First was, When the Tenures were in Being; and there till the Court of Wards was erected, the whole Jurisdiction of the King's Wards, where the Lands were held in Chivalry, was under the Jurisdiction of this Court.

So likewise, in Relation to Subjects, this Court determined, touching the Wardships of the Body, who was the prior, and who was the posterior Lord.

For the Wardship of the Body of the Heir went to the Lord who had the prior Homage, and that was determined in the Court of Chancery, where several Lords applied for the Writ of Ravishment, which was an original Writ.

But this Sort of Guardianship was a Sort of Dominion of Masters over Servants and Vassals, and was introduced among the Gothick Nations

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of ravishment & of custody, which is a right of custody, if inalienable from chancery, in y^e same manner as other writs, & like them returnable in y^e courts for law; or if not, how doth a jurisdiction to decide judicially on the right of guardianship between two or more competitors prove a right of appointing where there is no legal guardian?

tions, to breed them to Arms; and it was a great Burthen upon the People, and is fallen now with the Tenures.

But the Crown has another Jurisdiction, and that is as *Pater Patrica*, as a Father over his Children.

The King has a Right to take Care of Infants, Lunaticks, and Idiots, that cannot take Care of themselves; and this Care cannot be exercised otherwise than by appointing them proper Curators or Committees.

So *Fleta*, Cap. 9, Pol. 4, de Tutelis, speaking of Infants, *quidam Fleta. sub Custodia Parentum & proximorum Consanguinorum, & illis dantur Custodes de jure gentium.*

So *Bracton*, treating of this Matter, Lib. 2. Cap. 38. Fol. 86. Nunc *Bracton. autem dicendum, &c. de illis qui Minores sunt & infra etatem, & quos oportet esse sub Tutela & Cura aliorum, eo quod se ipsos regere non norunt, & quorum quidam debent esse sub Custodia Domini cum Terris & Tenementis, quae sunt de Feodo coram & quidam sub Custodia Parentum & Proximorum, Consanguinorum, ut praedictum est, & quibus dantur Custodes aliquando de Jure, de Antiquo Feoffamento, et aliquando Curatores ab Homine.*

Thus *Stamford*, in the 37th of the King, has the Protection of all his Subjects, and of all their Goods, Lands, and Tenements; and so of such as cannot govern themselves, nor Order their Lands and Tenements, his Grace, as a Father, must take upon him to provide for them, that they themselves and their Things may be preserved; and he quotes *Fitzherbert*, 232, that the King is bound of Right to defend his Subjects, their Goods and Chattels, Lands and Tenements; and that every one is in the Protection of the King, who has not forfeited it by some Offence. Now how can the Infants be protected by the Crown, but by assigning them proper Guardians where it is disputable.

Lord Coke says, in *Beverly's Case*, 4 Rep. 126. that the King shall have the Protection of their Goods and Chattels as well as of their Lands, and compares it to the Case of an Ideot.

Nobody has ever doubted the Jurisdiction of this Court, in the Case of Ideots, and Lunaticks; and indeed I should have thought this Point had been at Peace, as to the Infants, when it was settled by Lord Somers, in the Case of *Bertie and Falkland*. A

There are since, innumerable Precedents, wherein this Court has determined, touching the Guardianship of Infants; as in the Case of *Freeman* and the Bishop of *Oxford*, the 5th of July, 1719, where the Bishop of *Exeter*, surviving Guardian to the Father's Will, applies to the Court, and the Infant is sent from *Oxford* to *Cambridge*.

And in *Vernon and Vernon's Case*, 10 Geo. I. several Orders were made upon Petition; and among the rest, one upon Petition, that the Infant was conversant with the Daughter of the Guardian, that he should be immediately sent for, and ordered forthwith to *Eaton School*.

And in *Anesley and Anesley's Case* 'twas ordered, to take the Infant from the Mother; and a Sequestration against the Duke of *Buckingham* and the Mother, for not producing the Infant.

Now as the King has the Protection of Infants, I don't see any other Protection can be, than by assigning them their Guardians; and where

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should

*Lord C. makes no
much comp arison.
+ The chancery
jurisdiction was
there by a dis-
tinct commission.
But the King now
much as to infants.
A few years in
3. Cha. Cas. 129.
what is said in
136. See L. C. 2.
Ven. 342.*

should that Protection be exercised but in that Court where Care is taken of all Persons under natural Disabilities ?

Natural Allegiance.

The very Notion of natural Allegiance seems to be founded on this Protection that is due from one born here, though he goes into a foreign Country, and lives under, and takes Oaths to another Prince.

And why ? Because it is a Debt of Gratitude, due for the Protection, which the Infant receives at his first breathing vital Air, since Care is supposed to be taken of him, by appointing proper Guardians to manage him and his Affairs.

And I presume that the Law, that the next of Kin to whom the Inheritance should not descend, should be Guardian, was taken up originally as a Rule of Reason in this Court, and by Usage came to be the Law of the Land : For I have look'd into the Books of the Civil Law, and all the foreign Feudists, and their Rule is, that he that has the Right of Succession, has the Guardianship, *ubi Successionis Emolumentum ibi & tutele onus esse debet*, 28 Edw. I C. 1. seems to be only an Affirmance of the Common Law.

There are often Disputes who are the next of Kin, or who is the proper Guardian ? That must be determined somewhere : And where can it be determined but in this Court, where all Persons under Disability are protected.

Second Question.

The second Question is, Whether the Court can declare the Right of Guardianship by Petition, or whether it must be by Bill.

Objection.

'Tis said, That if the Right of Guardianship could be determined by Petition, it must be determined by Affidavits, where the contrary Party has not the Liberty to cross examine.

Answer.

'Tis agreed, That in all Cases where 'tis necessary for the Crown immediately to interpose, it must be determined upon Order ; for otherwise there can be no Provision for the Infant, during the Time of the Dispute.

So there is a Necessity, in some Cases, that it should be determined upon Petition.

But in this Case, who in Fact are Guardians, has been determined already in a Cause instituted by Bill and Answer ; and so there can be no Dispute touching the Fact ; and so the Right is properly determined upon Petition. *+*

Third Question.

The third Question is, Whether this be a legal Declaration of the Right of Guardianship ; that is to say, whether it will survive or not. And here it has been argued, that the Guardianship is a naked Authority, and so cannot survive. But,

'Tis agreed, That if it be an Authority, coupled with an Interest, it will survive.

Indeed, in the Civil Law, they looked upon it to be a naked Authority ; but yet where there were several Guardians, and one only gave Security, 'twas executed by him alone. See *Vinius, Tit. 24. de Satisfactione Tutor & Curator.*

But if it were an Authority, 'tis not like an Authority to do a single Act, where it must be done by them all, because 'tis the Will of the Party that authorises them all, and so one alone can't execute it.

But

a guardian may be appointed by petition without any bill depending; see 2. Atk. 14. 3. Atk. 83.

But in this Case, the Authority must, from the Nature of the Thing, be joint and several : For one alone must receive the Money of the Infant, and not meet altogether for that Purpose.

And were it an Authority, or were it not, 'tis to be construed joint and several. Else the more Guardians were appointed for the security of the Infant, he would be the less secure, because upon the Death of any one of them, the Guardianship would be at an End.

But no Doubt, with us, it must be reckoned an Interest.

For the Law has appointed Remedies, both droitural and possessory, to recover the Guardianship.

First, Droitural. And that was the Writ *de Custodia Terra & Heredis* : And Fitzherbert has compared the droitural and possessory Action, in the Title *de Custodia Terris & Heredis*, Fol. 133.

The Statute, *Merton, Cap. 6.* provideth, That in the Writ of Right of Ward, the Plaintiff shall recover the Value of the Marriage.

Secondly, Possessory. And that, at Common Law, was the Action of Trespass ; and in this, at Common Law, he could only recover Damages for his Ward, and not the Ward itself.

The Statute of *West. 2 C. 35.* gives a Writ of Ravishment of Ward, in which the Plaintiff recovered the Body of the Heir, and not Damages only.

And by the Equity of *West. 2 C. 24.* a Writ of Ravishment lay for the Guardian in Soccage, as a Writ in *Consimili Casu*.

Every Body will allow the Guardian in Chivalry had an Interest ; and if the Guardian in Soccage would have the Writ in *Consimili Casu*, he must have an Interest also.

And a Man may as well have an Interest of Honour, which every Person has in Relation to his Family, as an Interest of Profit.

And it appears in *3 Co. 37. Ratcliffe's Case*, that the Father had an Action of Trespass for taking away his Son and Heir, *quare Filium & Heredem rapuit*, though he was not, in Propriety of Speech, counted the Guardian : For the Heir was look'd upon as Part of the Family ; but the Father, however, had an Interest in the Son, and so it was Trespass to take him away.

But the Father had not a Writ *de Custodia Terra & Heredis*, because the Father was no Guardian ; nor was there any Need of a droitural Action, because he was always in Possession of his Son ; and so an Action of Trespass lies for the marrying his Heir apparent, *whether Quere. he be within Age, or of full Age* ; because 'tis an Injury to marry, and destroy the Hopes of his Family by an improvident Marriage. *Fitz. Abr. Tit. Garde. 32.*

And this lies even against the Lord : For the Father had the Custody against the Lord. For the Father being Tenant in Chivalry, could breed his Son to Arms ; but no collateral Ancestor had the Custody against the Lord.

And therefore this makes the Difference that is mentioned in *Ratcliffe's Case*, that a collateral Ancestor may have a Writ of Ravishment against any Person that ravishes *consanguinorum & heredem* ; (that is) his Heir apparent ; because that is an Injury to himself.

But the Action does not lie against the feudal Lord, because he had a Right to marry him.

And every Man may be said to have an Interest in his Heir apparent, because nothing imports him more, than to continue his Name in proper Representatives.

But the Father, at Common Law, could not appoint a Guardian, because the Law had appointed a Guardian, whether the Father was Tenant in Chivalry or in Soccage.

The first Law that gave the Father a Power of appointing, was 4 & 5, *R. & M. Cap. 2.* . the Words of the Statute are ; “ That Nobody shall take away any Maid or Woman-Child unmarried, being within the Age of 16 Years, out or from the Possession, Custody, or Governance, and against the Will of the Father of such Maid or Woman-Child, or of such Person or Persons to whom the Father of such Maid or Woman-Child, by his last Will and Testament, or by any other Act in his Life-time, hath or shall appoint, assign, bequeath, give, or grant the Order, Keeping, Education, and Governance of such Maid or Woman-Child.”

This gives an Authority to appoint the Custody of a Female Child for a special Purpose. He that takes away the Female Child, and marries her or deflowers her, is an Offender within that Statute.

So this being a Custody for a special Purpose, it was properly enough construed to be a naked Authority.

Therefore I take the Case in *Popb.* 204, to be good Law ; That when two Persons are appointed Guardians, by Authority of this Statute, and one of them dies, it will not survive, because that Statute gives an Authority to a special Purpose, to make the Ravisher criminal within that Law.

But the 12 *Car. 2. C. 24.* gave the Father a Power, by Deed executed in Writing, or by Act executed in his Life-time, or by his last Will and Testament, to appoint the Custody and Tuition of his Child or Children, till the Age of 21 Years, and such Disposition of the Custody to be as good and effectual against all and every Person claiming the Custody of such Child or Children as Guardians in Soccage, or otherwise, and the Persons to whom such Custody shall be disposed, to have a Writ of Ravishment of Ward, or Trespass.

This Statute was formed by *Sir Matthew Hale* ; and when Wardships were taken away, introduced the Testamentary Guardians ; and this Testamentary Guardian, by the Rules of the Civil Law, was to take Place before all others.

But our Testamentary Guardian is not a naked Authority, but is made after the Model of a Guardian in Soccage, and by Consequence an Interest passes to the Guardian.

And the Act (Rights) given to the Guardian in Soccage, are given by this Law.

But 'tis said, that every Interest is assignable, transferrable, or devisable, and that the Guardianship is not ; and therefore it is a naked Authority, and not an Interest.

Every Interest of Profit is assignable, because it is the Nature of Property, that the Person who is the Owner, should have Dominion over it, so as to assign or transfer it.

But the Guardian in Socage, has no Interest of Profit; it is an Interest of Honour, and for the Honour of the Family, committed to his next of Kin, and therefore is inherent to the Blood, and can't be assignable.

Because a Stranger could not have that Interest, to take Care of the Ward, nor have it at Heart.

The Guardian in Socage was accountable to the Infant, when he came to the Age of 14, and he could not transfer that Account to another.

The Testamentary Guardian, as is said, is formed after the Manner of Guardian in Socage, and comes instead of him, and is in *Loco Parentis*.

Therefore, though it be not assignable nor transferable, yet it is such an Interest as shall survive.

*See Co. Litt. 88. b.
a. 13. of the 13th edit.*

The fourth Question is, Whether the Ladies, or either of them, are in Contempt of the Court. 4th Question.

And 'tis very plainly sworn upon the Lady *Shaftsbury*, that she has owned, that she has seen him married and bedded.

The Mother's being present in this Case, is a plain Evidence of Assent.

And the Mother can't marry her Child, without the Consent of the Testamentary Guardian.

For the Father who had the Power over his Child by Law, has placed it under the Power of the Testamentary Guardian.

Therefore it is taken out of the Power of the Mother.

But 'tis objected, that this Lord *Shaftsbury* has married the Lady *Susannah Noel*, a Lady of Birth, Quality and Fortune, and therefore is married without Disparagement, and that this will be no Contempt of the Court.

When the Ward is put under the Protection of this Court by the Testamentary Guardian, it is a Contempt of the Court to marry him, without the Consent of the Guardian.

It is a Breach of Filial Duty, for Children to marry without the Consent of the Parent.

The Testamentary Guardian is in *Loco Parentis*, and he having put the Ward under the Protection of the Court, 'tis then a Contempt to marry him without the Guardian's Consent; and the Contempt being in marrying him without the Consent of the Guardian, an improvident Marriage is only an Aggravation of the Offence, if that had been the Case.

There is nothing in the Objection, that the Mother has the natural Power over her Son, and that *Jura Sanguinis nulla Lege Civili possunt dirimi*.

For the Father whilst living, was the Head of the Family; he had Power over his Child and he might dispose of him by Law. And 'tis the Duty even of the Mother, to pay that Respect to the Memory of her deceased Husband, as not to marry her Son, without the Consent of the Guardian, appointed by the Father.

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And

And when the Child is by the Guardian put under the Protection of this Court, it will be a Contempt even of the Mother, to marry him without the Consent of the Guardian.

As to the Lady *Gainsborough*, this Contempt is not sworn upon her.

For an Order for Sequestration, in the Case of a Peer or a Commitment, in the Case of a common Person, is a judicial Act of the Court, and therefore must be founded upon a proper Affidavit, as I apprehend.

The Order is the Judgment of the Court, the Sequestration or Commitment, is but the Execution of it.

And therefore the Judgment is to be founded upon Truth, and not upon Conjecture only.

For if she be examined upon subsequent Interrogatories, this will not make good the Determination of the Court, by a Matter *ex post facto*.

Coram King Chancellor.

The Case of Birmingham School.

1. l. 2. R. Wm 3 25. R. l. 1. Ch. 34.

Eyre Cap.
Justic. de Ban-
co, & Gilbert,
Cap. Bar.
Assistan.

KING Edward the VIth, intending to erect a Free-School at *Birmingham*, by Letters Patents, bearing Date the 2d of *January*, in the 5th Year of his Reign, grants and ordains, that from henceforth there shall be a Free Grammer-School in *Birmingham*, that shall be called the Free-School of King *Edward* the VIth, for the Education of poor Youth in Grammer, and did erect and ordain, that the School should continue for ever, under a Head Master and Usher; and that his Intention might take the better Effect, he incorporates 20 of the Inhabitants of *Birmingham*, who were to be, and to be called the Governors of the Possessions, Revenues and Goods belonging to the School, and appoints by Name 20 Men to be the first Governors thereof, who were incorporated by the Name of the Governors of the Possessions, Revenues and Goods of the Free-School in *Birmingham*; and if any of them died, or removed from *Birmingham*, others were to be elected in their Places; and he grants to this Corporation, several Lands mentioned in the Charter, to hold of him and his Heirs, of the Castle of *Warwick*, in Soccage, by the Rent of 20 s. and he grants to them a common Seal, and that they should answer before all Judges, by the Name of the Governors of the Possessions, Revenues and Goods of the Free-School of *Birmingham*; he gives them Power to appoint the Master and Usher, and that they, with the Consent and Advice of the Bishop of the Diocese, should make fit, and hold some Statutes and Ordinances, for and concerning the Order of Government of the Master and Usher and Scholars of the same School for the Time being, and concerning the Stipends and Salaries of the said Master and Usher, and all Things concerning the said School, and the Revenues and Profits thereof, with a Licence to purchase in *Mortmain*, &c.

His

His present Majesty, by a Commission dated the 28th of November, in the 9th Year of his Reign, directed to the Bishop of Litchfield and Coventry, and others, reciting the said Charter, and reciting, that the Election of the present Governors of the Possessions and Revenues of the Free-School, and of the Master and Usher, were not made according to the Form of the said Letters Patent, gives Power and Authority to the Commissioners, or any four of them, *tam per Sacramentum probor' & Legal' Homin' quam per Deposition' & eorum Test.* to examine with Effect, concerning the Lands and Tenements, and Rents belonging to the said School, and how they were disposed, and what remains in their Hands, and of what Value, and if any Accounts were taken of such Rents, and if such Accounts were just, and to appoint and prescribe such Orders and Statutes, for the good Government of the said Free-School, as they or any four of them should think expedient, and if upon the Inquisition or Examination, there were found any Abuses or Misapplication of the Charity, they should attend diligently, concerning the Premises, and execute all Things relating thereto, with Effect, *circa Premissa diligent' intendatis eaq; omnia & singula faciatis & exequimini cum effectu in forma predict'*, and that they should return what was done upon the Commission into the Court of Chancery.

There have been two Questions principally made in this Case.

First, Whether the King has a Visitatorial Power over this Corporation.

Secondly, Whether this Commission be a legal Commission.

First, Whether the King has a Visitatorial Power over this Corporation? 'Tis plain that the Visitatorial Power came over to us from the Civil and Canon Law; and they had in the Civil Law, after the Empire became Christian, Spiritual Houses, which were subject to Rule and Order, and they were expressly visitable by the Bishop of the Diocese; this is to be seen in the Code, *Lib. 1. Tit. 3. C. 40. Monasteria degunt seu Consentur sub Episcopis Territorum suorum & Abbatum quidam curam gerunt Episcopi Monachorum vero Abbates.*

By this Law, the Bishops were obliged to see that the Monasteries should keep to the Rules of the Order; and if they did not, they had by their Episcopal Jurisdiction, a Power to deprive them; and so it stood 'till the Popes, by their Encroachments, pretended to visit them by their own Legates.

Secondly, As to Lay-Incorporations, as Lazars Houses, Infirmaries, and Colleges for the Education of poor Scholars, they likewise by the Civil Law, were subject to the Visitation of the Subject or Christian *Episcopus Archidiaconus.* This may be seen in the Code, *Lib. 1. Tit. 3. Cap. 35.* And likewise Code, *Tit. Laus 42. Sect. 6, 7, 8, 9;* but this, by the Canon Law, grew into Disuse; for the Popes had no Power to meddle with these Foundations, because they were not Spiritual; and another Reason was, because there was nothing to be got by such Visitation; for they could not pay any Procuration-Money, nor entertain the Visitor; for it would be shameful to take it away from the Poor, to support their Luxury; and therefore the Canonists say, that the Founders shall be Visitors, and the Reason they give is, because they are

are proper Curators of their own Beneficences; and for this you may see *Lapis de Castel de Hospitalitate*, N^o. 13. and N^o. 29. and *Johannes Franciscus Parennus de Visitatoribus*, Quest. 3 & 4.

By the *Clementines*, Lib. 3. Tit. 11. Cap. 2. *quia contigit*, which recites the Abuses in Hospitals, there is a Division made by the Canon; that where the Founder don't visit, the Bishop shall; this was made about the Year of our Lord, 1305 or 1306, and was the standing Canon of the Church in the Time of Henry V.

We find it enacted by 2 Hen. V. C. 1. that Hospitals which are of the King's Foundation, shall be visited by the Ordinaries, by Virtue of the King's Commission to them directed, and that other Hospitals shall be visited by the Ordinaries, who shall enquire of the Manner of the Foundation, Estate, and Government of the same, and of all other Matters and Things necessary in that Behalf; and upon that, make thereof Correction and Reformation, according to the Law of the Holy Church, as to them belongeth.

Since the Words of the Act of Parliament are, that they shall make Correction, as by the Law of the Holy Church to them belongeth; it seems it does not destroy the Power of the Founder, and devolve it totally upon the Bishop, because by the Law of the Church, the Bishop could not visit, but in Default of the Founder.

Besides, Free-Schools are out of this Statute.

By the 39 of Eliz. C. 5. where Persons are allowed to incorporate Work-Houses for the Poor, by Deed enrolled, the Founders are expressly appointed to be Visitors; and therefore, I take the Law to be, that whenever any Poor are incorporated, the Founder has the Visitorial Power, unless he parts with it by express Words; but if he parts with it by express Words, then he has lost his Visitorial Power, having assigned and delegated it to others; and therefore that Case as put 2 Ro. Abr. 241. may be good Law, if properly understood; that where an Hospital is erected, and Governors appointed, the Governors are Visitors; the Meaning of which must be, that when an Hospital is incorporated as a distinct Corporate Body, and Governors appointed, that, in Point of Construction, is then a parting with the Visitorial Power; for there can be no End in erecting the Governors, but to make them Visitors, where the Poor are the Corporation, and the Revenues are lodged in them as a Corporate Body.

But if the Governors are incorporated, and not the Poor, and the Revenues are lodged in the Governors; if in that Case, there were no Visitorial Power over such Corporations, that Corporation would be uncontrollable, and then 'twere to no Purpose to give Rules and Orders to the Foundation of such a Charity, if there was Nobody to see them put in Use and obeyed.

The very giving of Rules and Orders in the Foundation of Charities, supposes that there must be Somebody to super-intend, and to see those Rules and Orders obey'd; and therefore the giving of Orders and Rules in the Foundation of any Charity, does of Consequence infer a Visitorial Power.

But

But the Case of *Sutton's Hospital* to Co. 13. 30, 31, has been greatly insisted on, where the Governors were incorporated, and not the School-Master and Scholars; and the Freehold of the Charity was likewise lodged in the Governors, and yet the Governors were allowed to be Visitors, and there was no Visitorial Power given them.

But to this there is a plain Answer.

First, That that was an Incorporation by Act of Parliament; and in that Act of Parliament, the Visitorial Power is limited and appointed by express Words; for in Fo. 2 and 3, the Act of Parliament is set forth, whereby *Thomas Sutton*, &c. (naming them) the Governors, are incorporated with Power to continue the Corporation by Election, and the Lands are vested in them; and then Fo. 5. comes the Clause of the Visitorial Power in these Words, and that the Supplicant during his Life, and the said Governors, and their Successors for the Time being, or the most Part of them, and such of them as the Supplicant shall thereto appoint and nominate, shall and may, after the Death of the Supplicant, have Power and Authority to visit the said Hospital.

Now here the Visitorial Power is limited by express Words to the Founder, during his Life; and indeed it is to be presumed, that a Founder who had given such large Endowments to an Hospital, would keep that Hospital to Rule and Order, and employ the Revenues to that Purpose.

And there being some of the most Honourable Persons in the Kingdom Governors, after his Death, the Visitorial Power is lodged in them upon the same Presumption.

But because an Act of Parliament lodges the Visitorial Power in the Governors, who have the Revenue, and expressly thereby makes them unaccountable; this will be no Rule to expound the King's Grant, by that which appoints Governors of an Hospital, and makes them a Corporation, and lodges the Revenue in them.

For Visitation is nothing else, but the supervising the Corporation, and seeing that they keep to the Rules and Orders of the Founders; and therefore it is the Corporation that is visitable, to whom these Rules are given, unless it were erected as *Sutton's Hospital*, where the Corporation give Rules and Orders to the Charity, and are expressly discharged of all Visitation themselves by Act of Parliament.

Secondly, I think in this Case, where the King erects a School, appoints Governors, and gives them Land, and a Power of making By-Laws, that they are subject to the Royal Visitation.

For because the Lands and Revenues may be liable to Abuse, and the King being Curator of his own Charities, will not be construed to part with the Power which the Law lodges in him, unless there were express Words for that Purpose.

Thirdly, It seems to be a foreign Interpretation, that committing the Government of the School to this Corporation, should make them, if they are in Default themselves, not to be subject to a Visitation.

Fourthly, The King's Grant can't be taken to a double Intent, to appoint them as Governors, and at the same Time, to exempt them from Visitation.

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Fifthly,

Fifthly, The Visitorial Power is ultimate, as is resolved in the Case of *Philips and Berry*, and 'twould be very strange, and not easily conceivable, that the King should part with such an ultimate Power, to correct the Abuses in his own Foundation.

Sixthly, This is a Sacred Trust in the Crown to superintend the Orders and Rules that have been given by the King, or any of his Royal Predecessors touching their Charities; this appears by the *Reg.* 40, 41. and that if this Right be invaded, a Prohibition lies; this appears likewise to be the Privilege of a Commissioner Founder, upon the general Rule of Reason, *cujus est dare & ejus est disponere*, and this is mentioned in the Case of *Philips and Berry*, *Show.* Parliament Cases 51. 4 *Mod.* 112. And *Stillingfleet's* Cases 413. And therefore the Visitorial Power is that Jurisdiction, from whence there is no Appeal to the Law from the Judicature, that the Party has erected by his own Disposition.

Nor can any Body imagine, that this Corporation, being erected by the Word Governors, and because that they are to place and displace the School-Master, that thereby they should not be visited in Case of Abuse.

Seventhly, It were a vain Thing to give Rules and Orders, touching the Charity in their Foundation, if there were Nobody to see them performed; for though this Body were to make wholesome Statutes and Ordinances of the Master and Usher, and Scholars, by the Advice and Consent of the Bishop of the Diocese, yet when these Statutes are made, there must be some Power to see them kept to, and without a Visitorial Power, there will be no Way to put them into Execution.

Eighthly, The Precedents are so in *Winbourn* School, *Basingstoke* School, *Plymouth* School and *Bethlem* Hospital, where the Corporations are after this Form, and yet they were all subject to the Visitorial Power.

Secondly, They object to this Commission.

First, That there is a Power given by Commission, to make By-Laws, and that could not be, for that it is to alter the old Foundation.

Answer. This Power of making By-Laws is good, for though the Crown can't alter the old Foundation, unless it appears to be a superstitious Use, yet By-Laws may be made, and new Rules and Orders given in Support of the Charity, and to answer the Intent of the Royal Founder; and we may suppose, that the By-Laws are so made, unless any Thing appear to the contrary.

Secondly, If the Commissioners were to abrogate any of the old Orders, and to make new ones, that would alter the Intent of the Charity, this Court would correct them; for though the Visitorial Power in the Case of a common Founder is ultimate, and can't be corrected by Law.

Yet where the Visitation is of the King's Foundation, and issues by Commission out of this Court, if there be any Abuse of that Authority, this Court will correct it.

Thirdly, This Power of making By-Laws in this Commission, I think to be good; but if it were null and void, yet that makes the Commission

sion not void in *toto*, but only in *tanto*, and these Powers are several, and distinct in the Commission.

The second Objection, made against the Commission is, that it gives no Visitorial Power to place or displace any of the Governors, or any of the Persons concerned in the Corporation.

Answer. Surely there are Words sufficient to give the Visitorial Power, for the Words are, *to enquire into all Abuses*, and then that *Circa premissa diligenter intendatis eaq; omnia & singul' faciatis & exequamini cum effect' in forma predict'*.

By which Words, if any Abuse were found, they were to do whatever was proper to be done, for the correcting such Abuses.

Secondly, If it were only a Commission of Enquiry, yet that would be a proper Foundation and Foot, for this Court to correct these Abuses that were found upon such Commission in a proper Manner; for that were a proper Foundation, on which a Superstructure must be raised, for correcting the Abuse of the Charity,

And if it could not be made below, by Virtue of the Commission, it ought to be made here. But I take it, that since by Virtue of the Commission, they are to proceed with Effect, they are to make effectual Orders for correcting the Abuse, which comprehends the whole Exercise of the Visitorial Power, and therefore they may place or displace by Virtue of the Commission; and if they have done nothing to the Detriment of the Charity, as there is nothing of that Kind objected to the Commissioners, I think all their Act and Orders seem to be well founded.

And therefore I am humbly of Opinion they are good.

Rules on Motion by King, Chancellor.

A Bill was brought to quiet Possession of a Right of Commonage, in a common Part of the Manor of *Moreton* in *Surrey*, and to prevent Distresses. Rules on Motion.

An Answer and Demurer were put in, and then Plaintiffs amend their Bill, and obtain an Injunction 'till Answer and further Order; the Defendants now moved to dissolve it, and the Plaintiffs produced Affidavits of above 50 Years quiet Possession, and Evidence of their Right of Commonage, in the Time of Queen *Elizabeth*, yet the Court refused to interpose, 'till one or more Verdicts at Law, and dissolved the Injunction, that it may be tried immediately. Right of Common.

A Plaintiff here, may either make a general Election to proceed here, or at Law, or a Special Election, as to proceed for Part here, and the other Part at Law, but the Court will judge of the Reasonableness of that Special Election. Election.

One Defendant can't move to strike another out of the Bill, who has never been served with Process, in Order to make him a Witness, but the Plaintiff may; and a Defendant may have an Order to examine such Defendant saving just Executions. Parties witnesses.

A Bond for Performance of Articles though cancelled, was made an Exhibit, and allowed as Evidence, to prove the Execution of the Articles, the Limitation being inserted and recited in the Condition of the Bond.

Though

Though a Plea in Bar be allowed, yet the Plaintiff may reply to the Truth of it, and put the Defendant on proving it, and may except to any other Part of the Answer.

Bills of Review.

Bills of Review, are allowed only on Errors apparent, in the Record, or on new Matter discovered since the Decree; so if an Original Bill be brought for Matters, part of which are contained in a former Bill and Decree, and Part new or by Way of Supplemental Bill; the Court will on a Demur to so much as was contained in the former Decree, send it to a Master, to see what was, and what was not in the first Bill, and allow the Demurer accordingly.

Robinson and Haynes.

Purchase under an Outlawry pleaded.

A Bill was, to be relieved against a Judgment in Ejectment, which was obtained by Virtue of a Purchase, under a *Venditioni exponas* of a Term for Years, upon an Outlawry of the Plaintiff, who insisted, that his Title to the Lands was a Fee, and not a Term for Years, upon which an Injunction was granted; but the Defendant pleaded the Purchase under the Outlawry, and it was allowed, and the Injunction dissolved.

Waters and Glanville.

Release subsequent to a Decree pleaded.

WATERS had made a Contract with one *Elson* for Land, which he assigned to *Glanville*; *Elson* had afterwards a Decree for Performance against *Waters*, he being the Party to the Contract, but decreed that *Glanville* should stand in his Place, and indemnify him against that, and all Decrees; *Waters* and *Glanville* come to an Account, and mutual general Releases are given, in which the Words *all Orders and Decrees of the Court of Chancery* are inserted; afterwards *Elson*, upon Petition, has an Order for Interest, from the Time of *Waters* taking Possession, amounting to 700 l. founded upon the Decree, made before the Releases given, who thereupon brings his Bill, to compel *Glanville* to pay it, he being by the Decree, to stand in *Waters* Place; *Glanville* pleaded this Release subsequent to the Decree, and allowed *per Cur'*, though it was not taken Notice of at the Time of stating and settling the Accounts.

Knewell and Gardiner.

Residuum undivided, to be distributed.

A Will was begun, and by it several Legacies given to the next of Kin, and likewise to the Executors, and then at the Beginning of the next Sentence, the Will stopped, and was left unfinished.

Lord King. The Testator having given the Executors a Legacy, it is most likely he would have given away the Residue from them, and therefore decreed the undisposed Residue to be distributed according to the Statute of Distributions.

Floyd

Floyd and Mansell.

IN 1697, the Plaintiff's Father mortgaged the Lands in Question to the Defendant, being about 28 *l.* a Year, for securing 300 *l.* in 1698, the Mortgage being forfeited, the Defendant recovered Possession by Ejectment, and brought a Bill to redeem or be foreclosed, and had a Decree accordingly, which Decree was signed and enrolled in 1701; in 1702 the Plaintiff's Father died, and the Plaintiff continued an Infant 'till 1709, when he came of Age; in 1721, and not before, he brought an Original Bill to set aside this Decree, and be let into a Redemption, on Payment of Principal, Interest and Costs, suggesting that the Defendant was much overpaid, and the Lands were of greater Value, and that all the Proceedings in the Decree were *ex parte*, and that the Service of the *Subpoena* to hear Judgment, was only on the Clerk in Court, on Affidavit that the Plaintiff was out of *England*, which Affidavit was false, and that there had been no Service at all of the Order, for making the Decree absolute, and other Irregularities. The Defendant answered to Part, and pleaded the Decree of Foreclosure and Enrollment, and insisted it would be against Practice to set aside a Decree, signed and enrolled by an Original Bill.

Bills to redeem by Infants limited, &c.

No Original Bill, to vacate a Decree signed and enrolled.

Lord Chancellor dismissed the Bill, but without Costs; and laid great Stress on the Length of Time, the Plaintiff being of Age 12 Years before the filing his Bill, and seemed to think it reasonable, that Bills for Redemption against Mortgagees ought not to be brought after 20 Years Possession, but should be barred by the Statute of Limitation of *Jac. 1.* as Entries are at Common Law; that in this Case, Infancy of the Plaintiff would not help him, the Right to redeem not beginning in his Time, but in his Ancestors, and in all such Cases the Party was barred, and had not 10 Years after the Impediment was removed.

Meder and Birt.

A Bill was brought to redeem some Lands, conveyed in 1694, to the Defendant's Grandfather, by the Plaintiff's Father for 500 Years, to be void on Payment of 126 *l.* and Interest.

The Defendant pleads, that he is a Devisee of those Lands under the Will of his Grandfather, who in 1692, purchased them for a 200 Years Term, without Condition of Redemption, and had enjoyed 15 Years quiet Possession. *Cur'* over-ruled the Plea of the Defendant, for not answering sufficiently as to the Mortgage, and the Plea of the Purchase may be true, for it may be only a Term for Years to attend the Inheritance.

Plea of a Purchase over-ruled, for not answering to the Mortgage.

Birch

After a Bill to redeem, and a Cross Bill, &c. decreed; a Bill of Revivor and Supplemental Bill.

IN 1717, a Bill was brought to redeem or be foreclosed, and likewise a Cross Bill to redeem, on which was a Decree for Payment of Principal, Interest and Costs, or else to be foreclosed, and on paying, to be let in; the Mortgagor died, and the Account being taken, and the Plaintiff finding the Estate insufficient, now brings a new Bill of Revivor, and partly a Supplemental Bill, both to review the former Decree and Proceedings, and likewise to have an Account of the Assets of the Defendant the Mortgagor, and thereout to have Satisfaction for a Bond which was given as a collateral Security with the Mortgage.

The Defendant who was the Executor of 'the Mortgagor,' pleads the former Decree in Bar, that the Plaintiff elected his Satisfaction, and had not so much as insisted or suggested that Satisfaction deficient, so that it does not appear, but that he may receive a double Satisfaction for his Debt, and that it was plain he had not waved the Mortgage by his Bill of Revivor.

The Plaintiff insisted, that it was the Practice of the Court, that taking out of Process, or making Use of any Counter Security, was in itself a Waiver of the Foreclosure, and a Mortgagee had always his Election to wave and open the Foreclosure, and have Recourse to his Bond and Covenant, if he thought proper.

Plea to stand for an Answer, &c.

Cur' The Plaintiff by his Revivor, has not waved the Mortgage, or so much as suggested a Deficiency, so the Plea must stand for an Answer, without Liberty to except.

Gascoyne versus Sidwell and others.

Though no Bill of Discovery is to be on penal Statutes, without waving the Penalty.

THE Bill was brought by the Plaintiff, who was the Executor and Devisee of Sir Robert Nightingale, against several Defendants to have an Account of great Quantities of Bullion, Goods and Effects to 9000 l. Value, put into Partnership with, and sent by the Defendants to several Parts beyond Sea in Asia and Africa, and to have an Account of the Profits of the said Trade, which had been very considerable.

The Defendants, instead of answering, set forth and pleaded the several Acts of King William for establishing the East-India Company, and the Privileges granted to the said Company of trading to the several Places mentioned in the Bill, exclusive of all other Person or Persons, and likewise the Forfeitures and Penalties which any other Person or Persons trading thither should incur, which was the Forfeiture of the Ship, Cargo, &c. and double the Value, unless such Ship traded with the Licence of the said Company.

And likewise pleaded the 6th of Queen Anne, for granting further Privileges to the said Companies.

And

And so, for that if the Facts charged in the Bill are true, the Defendants would be liable to great Forfeitures and Penalties; they plead the said Act and Forfeitures in Bar of any Discovery.

And for the Defendants it was insisted, that no Person is obliged to discover what may subject him to a Penalty, to any Person that has no Power, and does not offer to remit such Penalty; that this is the constant Rule in Cases of *Tenant for Life*, committing Waste or levying a Fine, &c. or any other Forfeiture, unless the Forfeiture is remitted, for no Man is obliged to accuse himself.

Yet the Advantage of pleading it, seems waved by Partners in clandestine Trade.

In this Case, half the Forfeiture is given to the King, and half to the Informer, and the Party injured is the *India Company*, and they are not Plaintiffs; but yet the Defendant's Answer may be Evidence against him, upon an Information by the *India Company*, whereby they will have the Benefit of the Discovery without waving the Penalty, which they could not have, if they were Plaintiffs; and compared it to the Bill lately in the Exchequer, of one Highwayman against another.

On the other Side, for the Plaintiff, they allowed the general Rule of not discovering what would subject to a Forfeiture, but insisted, that this might not be such a Case, for other Persons besides the Company may trade to these Parts by the express Words of the Acts, provided they have a Licence or give Security; and it does not appear, nor is averred, that Sir *Robert Nightingale* had not such a Licence, or that they believe he had not; nor have they deny'd that any one of the Partners were not licenced, nor had not given Security, for that might justify the Trade of the other Partners; but instead of denying this, which must lye in their own Knowledge, they only say they are advised and insist, &c. not to answer; that here was no Danger of Informations from the Company, which must be brought in three Years after the Fact by the Crown, and in two Years by any other Person, and it appears, that more than three Years was expired, before filing this Bill.

That Plaintiffs are at least entitled to an Account of the Partnership Effects, whatsoever they are of the Trade, whereas the Plea extends to all.

Cur' Though there was no Pretence to have a Discovery, yet such Plea must have the greatest Strictness and Exactness, which tend to support wrong doing, and they don't say that either Sir *Robert Nightingale* or themselves had not a Licence.

That where two go on an unlawful Trade, they seemed to have entirely waved that unlawfulness as between themselves, so disallowed the Plea and ordered them to answer.

Note, Sir *Robert Nightingale* at the Time of this Trade, was a Director of the *East-India Company*.

Powell and Pillett.

Bill for Performance of a Marriage Contract, depending on a Condition precedent, dismissed.

Defendant agreed by his Note under Hand, to pay the Plaintiff 200*l.* within two Years, and give him a *Reek* of Wheat on Condition he married his Daughter, and settled 600*l.* upon her for a Jointure, &c. The Marriage took Effect, and there was Issue a Daughter, but both Mother and Daughter died before the two Years expired.

The Plaintiff insisted it was an Agreement proper for a Court of Equity to execute; that he had married the Defendant's Daughter, and had been looking out for several Purchases to lay out the 600*l.* and was only prevented by the Act of God.

Defendant insisted it was a Condition precedent, and to be performed at all Adventures before the Plaintiff could be entitled to the 200*l.* and if any Damage, he might have his Action at Law; that the Plaintiff was not bound to lay out the 600*l.* and therefore there were no mutual Remedies.

Cur' said it was in his Power to have entitled himself to the 200*l.* when he pleased, by laying out the 600*l.* which not being done, the Bill was dismissed, but without Costs.

Sayle and Reeves and others.

Bill to perform an Agreement for Sale of Copyhold Lands, &c. the Title doubtful.

THE Bill was brought to have an Execution of Articles of Agreement for the Sale of some Copyhold to the Plaintiff, on his Payment of 538*l.* 13*s.* to the Defendant *Thomas Reeves*, one Guinea being paid in Part, and to compel the Lord of the Manor to admit him in Fee, according to the Agreement. The Case was,

That one *Thomas Reeves* in 1685, surrendered these Lands to the Use of himself for Life, then to *Mary Reeves* his Daughter for her Life, then to *John Reeves*, and the Heirs Male of the said *John Reeves*, procreat' seu procreand' and for Default of such Issue, to the Use of *William Reeves*, Brother of the said *John*, and the Heirs Male of his Body, procreat' seu procreand', and for Default of such Issue, then to *John Reeves*, and his Heirs Male procreat' seu procreand'; Remainder to the right Heirs of the said *Mary Reeves*.

The first Remainder Man *John*, was the Father of the Defendant *Thomas Reeves* of *Wanstead*, who entered into the Articles, and was admitted to him, and his Heirs Male, with the above Remainders over.

William Reeve the next Remainder-Man, was the Father of *Thomas Reeve* of *St. James's*, (another Defendant to the Bill) and only submitted his Interest to be taken Care of by the Court.

Custom of the Manor, as to barring Remainders, &c.

The Defendant *Thomas Reeves* of *Wanstead*, and the Lord, both insisted, that there was a Custom in the said Manor, that no Tenant in Tail could bar the Remainder by a Recovery, but the Custom was by surrender after Issue had, and not before, agreeable to the Case of *Entails*, before the Statute *de Donis*.

The Plaintiff would have insisted, That *Thomas Reeves* of *Wanstead*, was Tenant in Fee, and not in Tail; and that if he was Tenant in Tail, the Custom was bad, and tended to a Perpetuity. That the said *Thomas* was not the Donee, but the Issue of the Donee; in which Case, at Common Law, the Land would not go to any collateral Heir, but revert; and cited, That the like Case was in *B. R. Idle and Coke*, in 1705.

Curia. As to the Remainder-Man, *Thomas Reeves*, of *St. James's*, there was no Pretence to make him a Party, therefore as to him, the Bill was dismissed with Costs: And as to *Thomas Reeves* of *Wanstead*, the Court said, It seemed to be a Bill, to know the Opinion of the Court, whether the Plaintiff had bought a good Title. But it did not belong to the Court, nor would my Lord Chancellor give any Opinion, as to the Title or Custom; but decreed in general, a specifick Performance of Articles, of the 24th of *December*, 1724; and decreed the Lord, to admit the Plaintiff accordingly. But there being no tender of a Surrender in this Case, to the Lord, and consequently no Refusal, he was to have his Costs.

Keilway and Keilway.

THE Plaintiff was the Widow and Administratrix of one that died Intestate, possessed of a considerable Personal Estate, leaving the Widow, but no Children, and a Mother, a Brother and Sister, and two Nieces, the Children of another Brother; and the Question for the Opinion of the Court, was between the Mother, and the Brother and Sister, *viz.* Whether the last were entitled to any Distribution with the Mother, upon the Words of the Statute of 1 *Jac.* 2. *Cap.* 17. which Enacts, *That if after the Death of the Father, any of his Children should die Intestate, without Wife or Children, in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother.*

Statute of
Distribu-
tions.

It was agreed the Widow was to have one Half, and 'twas urged, That the Mother was intitled to the other Half. It was said that the Mother was next of Kin; and upon the Statute of Distributions, of 22 *Car.* 2. took all, when there was no Wife or Child, as the Father did. And before this Statute, if a Man-Child dy'd without a Wife, leaving Children, they would have the whole under the Statute of Distributions: So if such Child died without Children, leaving a Wife, if that Case does not continue as it was before the Statute of King *James*, and the only Case provided for by that Statute to let in Collaterals with the Mother, was when such Child died without either Wife or Children: But here is one of them, *viz.* the Wife.

Cur' Before the Statute of 22 *Car.* 2. they distributed first among the Lineal descending Line, as Children; then they took the Lineal Line ascending, as Father and Mother; and then the Collateral Line, as Brothers and Sisters.

The Intent of this Statute of King *James*, was plainly to put the Mother in the same State and Condition with the Collaterals, who before stood on the same Foot with the Father. So that whenever she is intitled, they shall have an equal Share with her.

If one die without a Wife, leaving Children, they have the Whole; if without Children or Wife, leaving a Father, that Father has the Whole; if no Father, then to the Mother and the next of Kin, if without Child, but a Wife and a Father, it goes in Moieties between the Wife and the Father; if no Father, but a Mother (as this Case is) then that Moiety between her and the next of Kin, in equal Degree, which is here the Brothers and Sisters and the two Nieces, the Representatives of the deceased Brother.

Beatniff versus Gardiner.

Execution,
Gr. pleaded
by an
Executor.

BILL against an Executrix to have an Account of Assets, and Satisfaction of a Debt of 660*l.* secured by Judgment against the Testator alledging a Devastavit, &c. The Defendant, by Schedule, sets forth the Assets, and deny'd by her Answer any Waste: And for Plea to any Relief said, That her Testator was in Execution on the said Judgment in his Life-time, and was discharged from thence by the express Order of the Plaintiff; and therefore pleaded such Discharge in Bar, such Discharge being a Release of the Debt in Law and Equity: And the Plea allowed.

EQUI-

EQUITY CASES

Heard and Decreed in the Ex-
chequer in *England*,

Tempore GEORGE II Iⁿⁱ.

Bennet versus Trespafs, Bocket, and Whitehall.

THE Case is, That the Plaintiff having been Vicar of the Parish Church of *St. Giles's* without *Cripplegate, London*, ever-since the 4th of *April, 1717*, did in *Trinity Term, 5 Geo. 1.* exhibit his Bill in this Court against the Defendant, for Tythes in *London*, after the Rate of *2 s. 9 d. per Pound*, according to the yearly Rent of their Houses, by Virtue of the Statute and Decree, *37 H. 8.*

The Custom
of paying
Tythes in
London.

The Defendant, *Trespafs*, was on the said 4th of *April*, and has ever since continued an Occupier of an House within that Part of the said Parish which lies within *London*, or the Liberties thereof, of the yearly Value of *12 l. Bockett* of another of *16 l. per Annum*, and *Whitehall* of two Houses, from *April* the 4th aforesaid, till *Midsummer, 1715*, at *22 l. per Annum.*

There was no Proof in this Case, whether these Houses were, or any of them was in Lease at the Time of making the Act or not; nor that the Sum of *2 s. 9 d.* in the Pound was at any Time paid according to the Value of the Houses, according to the Statute and Decree of *H. 8.* But,

It is proved by some of the Plaintiffs Witnesses, in their cross Examinations, on the Part of the Defendants, that till the Time of the present Vicar, they never heard of any such Demand as *2 s. 9 d. per Pound* for Tythes within the said Parish.

That in two antient Tythe-Books, there appears charged for Tythes against the Names of the then Occupiers of *Trespafs's* House, the several Sums of *5 s.* and *4 s. 4 d.* and *2 s. 6 d.* so charged; which said Sums of *4 s. 4 d.* and *2 s. 6 d.* are proved to be the Collector's Hand Writing; but the *5 s.* is of another Hand Writing; and in another Book, the several Sums of *4 s. 4 d.* and *2 s. 6 d.* so charged, and proved to be the Collector's Hand Writing; but no customary Sum, *Modus*,

Q. If not paid
quarterly, &c.

or other certain Sum was proved to have been ever paid than as aforesaid.

That in a Book, commencing in 1708, and ending in the Year 1713, Bockett's House is charged 1 s. 6 d. and Whiteball's Houses 1 s. each.

It is proved by one *Sureties*, that for nine Years, during the Time of Bishop Fowler, he lived in *Trespas's* House, and during that Time he never paid more to the Vicar than 10 s. *per Annum*, viz. 2 s. 6 d. *per Quarter*.

The Question is, If 2 s. 9 d. *per Pound*, of the yearly Value of the said Defendants respective Houses, be due for Tythes, by Virtue of the said Statute and Decree of the 37 H. 8. or not.

For the Plaintiff, it was argued, That the Sum of 2 s. 9 d. in the Pound, ought to be paid by the Decree on the Statute of 37 H. 8. Cap. 12. and they look'd upon that Statute to be the general Law of Tything in the City; and that if the Defendants could not set up a *Modus*, or Composition, whereby it appeared, that they paid less, that this Rule of Tything ought to take Place. And they made several Objections to this *Modus* set up by the Defendants; as,

Note, No Tythes of Houses are due of Common Right.

First, That it was not proved to be Time out of Mind: And nothing less than an immemorial Custom ought to be a Bar against a Common Right.

A *Modus* is to be tendered. Q.

Secondly, It was not set out, that the *Modus* was paid annually, or half yearly; and if the particular Time of the Payment of a *Modus* be not set out, that *Modus* is not well pleaded, nor is it a good Bar: And the Reason is, because the original Agreement must be certain that the Person may know, when and what to demand. But here there was no Time set forth in this *Modus*, and therefore it could be no good Bar, nor was the *Modus* tendered to the Plaintiff.

In this Case they quoted for the Plaintiff a Decree in the 16 Jac. 1. wherein the Court had decreed 2 s. 9 d. in the Pound; and likewise the Case of *Sheffield* and *Serjeant*, in Mich. 1657; and likewise the Case of *Humfrevill* and *Plumstead*, Trin. 27 Car. 2. *Grant* and *Cannon*, Mich. 5 W. & M. *Sir Patience Ward* and others versus *Kidder*, 5 W. & M. *Sayer* versus *Munford*, Mich. 6 W. & M. and the Case of *Townly* and *Wilson*, 7 Julii, 1705; in all which Cases, the Court had decreed the Sum of 2 s. 9 d. *per Pound*, according to the said Statute and Decree.

See Bohun's Law of Tythes, pa. 441, &c.

And Mr. Baron Price, who was of Opinion for the Plaintiff, said, The Statute was thought to be in Derogation of the Rights of the Clergy: For it appears by *Linwood*, 201, and by *Stow*, that the Laity used to pay $\frac{1}{2}$ d. in the Pound to the Clergy, upon every Sunday and Holyday, which came to a greater Sum than 2 s. 9 d. viz. 3 s. 5 d. *per Pound*.

But it was resolved by the other three Judges, That the Case upon this Statute was not like a *Modus*: For the Decree in the Statute is, That all Houses within the City of London and Liberties, shall pay 2 s. 9 d. for every 20 s. Rent; and then comes the Provision in the 18th Section.

Provided also, and 'tis Agreed, That where any less Sum than 2 s. 9 d. in 20 s. Rent, has been accustomed to be paid for Tythes, that then, in such Places, the said Citizens and Inhabitants shall pay only after such Rate as has been accustomed.

Now they said it was plain by the Statute itself, and by the Citation before mentioned in *Linwood*, that in many Places in the City, there had been a Custom to pay Tythes according to the Pound Rent; and these the Statute never intended to alter or enlarge, but to establish: For the Statute was not designed in Destruction of any settled Right; nay, they took it farther, That if there had been a Payment of lesser Sums by Agreement between the Parson and Parishioners, they were confirmed by the Statute; because it was the Design of the Statute, to settle such Customary Payments: And it was their Design, that they should not be unravelled on either Side; and accordingly such Customary Payments and Agreements have been complied with ever since the Statute. And,

That lesser Sums have been paid by almost every Parishioner to the Parson, and therewith they have been content. And although several Decrees have been made in this Court, for Payment of 2 s. 9 d. in the Pound, yet no Customary Payments, in any Parish, have been set aside or broke through; but these Matters have been compounded between the Parties, and the Manner of Tything has continued the same in each Parish, except in such Parishes as are otherwise regulated by the Statute 22 Car. 2. C. 15.

They said, That the 18th Proviso was a perfect Exception of all those that had paid lesser Sums out of the Decree; and therefore this could not be urged as a *Modus*, or set up in Bar of Tythes: For Tythes were originally due, and therefore the Bar must be compleat; but there are no Tythes of Houses due of common Right; for they are none of those Things that *renovare in Annum*; and therefore the Common Law (which followed the *Levitical* Pattern) did not make them Tythable; and therefore they are Tytheable only by Custom or Agreement, where there have been such Customs and Agreements.

The new Rate of 2 s. 9 d. per Pound, was super-induced by the Decree; and it is a strange Thing to say that the Decree was in Prejudice of the Clergy, when it appears, that less Sums are now constantly paid for Houses in the City, than what would be paid if they were rated under the Decree. And *Note*, It appears, the antient Payments, in lieu of Tythes of Houses in *London*, were somewhat less than 2 s. 6 d. per Pound.

But it plainly appears, that before the Desolution of Monastries, a great deal of Service in *London* was performed by the regular Priests, who not only said their Masses, but visited the Sick, and performed Offices of Devotion in many Parts of the City. And when they were extirpated, this Duty fell upon the Parochial Clergy; and then it was necessary that their Maintenance should be increased, and therefore this Decree was made, that all Persons should pay the received Rents from Houses, (that is) where there had been accustomed Payments, the Tythes were to continue payable, according to that Custom; and

D d d

where

See *Bohun's*
Law of
Tythes, pa.
463.

Note:

See *Bohun's*
Law of
Tythes, pa.
440.

where there was no immemorial Custom, yet if there had been by Agreement, &c. a Payment for 8 Years past, this, according to the Frame of the Statute, is to be look'd upon as a Customary Payment; for the Divisions and Severances of the Houses, Wharfs, and Warehouses, were to be as they had been for 8 Years past. So that the Construction seems to be, That if there had been an Agreement to pay Tythes for 8 Years past, they were accustomed Payments within the Statute: And this will form an uniform Notion, that if there were Tythes, by Custom or by Agreement, for 8 Years past, they are within the 18th Proviso of that Statute.

But where there were no such accustomed Payments, there the Statute is introductive of a new Law, and lays the Charge upon all others to pay 2 s. 9 d. in the Pound.

As to the Objection, That there was no particular Time of Payment alledged, Baron *Page* said, That the Statute, by the 11th Proviso, had appointed the Payment of Tythes quarterly, and therefore it need not be set out in the Bill as the authorized Payment.

But it seems doubtful whether that Proviso extends any farther than to the 2 s. 9 d. mentioned in the Decree, and not to the accustomed Payments, mentioned in the 18th Section of the Act.

But in this, all the three Judges agreed, That they were not obliged to set up these Customary Payments, as *Modus's*, in Bar of Tythes; for these Customary Payments are Exemptions out of the Decree; and therefore, in what Manner soever they have been paid, if there has been a Customary Payment since the Statute, of a lesser Sum, they cannot be bound by the Decree, to pay 2 s. 9 d. per Pound.

Now, if all that pay less Sums be exempt from Payment under the Decree, and are not within the Decree, nor within the Obligation of the Statute, we ought to try whether there be such accustomed Payments or not; especially since in this Case, it appeared by the Books of the Parson, that less Sums were collected; and it could not have been presumed, that they would have been collected in that Manner, if they had not been the old accustomed Payments. For how could those Sums have come into the Parson's Books, if they had not been the old accustomed Dues.

Note.

And the Difference of the Payments in the Books may be reconciled, by supposing some of them to be quarterly, some half yearly Payments.

This Case relates to the Inheritance, and the Inheritance is to be bound by our Decree. And where the Inheritance is charged, meerly by Custom, 'tis usual and just, if the Parties desire it, to try such Custom at Law.

Therefore the Court directed an Issue at Law, to try whether any less Sum, than after the Rate of 2 s. 9 d. in the 20 s. Rent, had been accustomed to be paid by the Defendants for Tythes, and what such Sum was.

In this Case were quoted 2 *Inst.* 660. *Noy.* 130. *Hard.* 116. *Watson*, 387 to 399. *Cro. Car.* 596. *Telv.* 31. *Moor*, 912. 11 *Co.* 15. *Grant's Case*.

From this Decree the Plaintiff appealed to the House of Lords, where the Decree was (*Dissentiente Clero*) justly affirmed.

Reeves

Reeves versus Buttler.

THIS is an Action of Trespass, wherein the Plaintiff Declares, for breaking and entering his Close. And then there is a Count, that the Defendant, *Richard Buttler, infra Tempus predict'*, viz. 10 Die Januarii, Anno Reg' dict' Dom' Regis nunc 10, Vi & Armis, &c. un' Dom' & un' al' horreum ipsius Thomæ Reeves apud Ilcoy predict' in Com' predict' fregit ac ostia Dominus & horrei predict' obseravit & Bona & Catalla, viz. Centum Carect' Tritici Cent' Cent' Carectat' Seisgir' Centum Carrect' Horrei, Cent' Carect' Tabap' Cent' Carect' Fæni ipsius Thomæ Reeves, *ibid Invent' cepit ac ead' Bona & Catalla per quatuor Septimanas tunc' prox' Sequen' ac eod' Thomæ Reeves in Domo & Horreo illo detinuit*; and the Jury fined two Pence Damages; and the Question is, Whether there shall be full Costs or not?

Gilbert, C. B.
Price, Page,
Hale.
The Lord
Chief Baron
Gilbert's Ar-
gument.
Of Costs and
Damages, &c.

And I think there should not be full Costs.

The Case depends upon the Interpretation of several Statutes compared one with the other.

To understand it rightly, we must go back as far as the Statute of Gloucester, which says, That whereas, before Time, Damages were not taxed, but to the Value of the Issues of the Lands, it is provided, That the Demandant may recover against the Tenant, the Costs of his Writ purchased, together with the Damages aforesaid: And this Act shall hold Place in all Cases where the Party is to recover Damages.

10 Co. 116.
2 Inst. 287-9.

That Statute was that which gave the Costs *de Incremento*: For at Common Law, if the Defendant prevailed, the Plaintiff was only amerced, *pro falso Clamore*; but this Statute gave the Costs of the Writ, which by a benign Interpretation, they extended to all legal Proceedings, as being founded upon that Writ.

And the Interpretation was, that though the Jury were to settle the Damages, for the Wrong done; yet the Court were to settle the Costs of the legal Proceedings, because these were Matters of Law to which the Jury could not answer.

Thus it stood till the 43 Eliz. Cap. 6. which enacts, That in all Personal Actions, to be brought in any of her Majesty's Courts at Westminster, not being for any Title or Interest of Lands, nor for any Battery, if it shall appear to the Judges of the same Courts, and is so signified or set down by the Justices, before whom the same shall be tried, that the Debt or Damage shall not amount to 40 s. or above, then there shall be no more Costs than Damages.

This Statute is pretty darkly penn'd, and therefore I believe had very little or no Effect.

The Intention of it, no Doubt, was to bring back these small Actions into the Country Courts; but by the Words of the Law, the Judge that tryed it was to signify the Damages, not to be above 40 s. which is making the Judge that tryed the Cause, Judge of the Fact, and to certify in Approbation of the Verdict.

And

Note, The Chief Baron said, he could find no Precedent of any Certificate, pursuant to the Statute in any of the Books of Entries.

And it was very hard, that when a Man pursued his Remedy, for a Debt or Damage, which happened within the Compass of 40 s. that he should be punished for bringing his Action; and therefore, I suppose, unless the Action appeared exceeding frivolous, the Judge seldom certified to cut off the Plaintiff's Costs.

By 21 Jac. 1. C. 16. in all Actions of Slander, to be sued in any Courts of *Westminster*, or in any other Court whatsoever, if the Jury upon Trial of the Issue, find the Damages under 40 s. the Plaintiff shall recover no more Costs than Damages, without any further Increase of the same. This is a direct Repeal of the Statute of the *Gloucester quoad*, these Actions of Slander, where there were no more Costs than Damages; and it takes away these Costs, *de Incremento*, by express and positive Words.

Salk. 208, Ven. Philips, a good Case upon the Statute.

We come now to 22 & 23 Car. 2. C. 9. §. 149. which says, That to make the Statute of *Eliz.* more effectual, it was enacted, That in all Actions of Trespass, Assault and Battery, and other Personal Actions, if the Judge did not certify, that the Title of the Land was in Question, or that the Battery was sufficiently proved, if the Damages were found under 40 s. the Plaintiff should recover no more Costs than Damages.

The Construction upon this Statute was, That in all Actions of Battery, and in all Actions where Freehold could come in Question, if the Damages were under 40 s. the Plaintiff must procure a Certificate from the Judge, in Order to obtain his Costs; but in all other Personal Actions, the Law stood as it did before the Statute of *Eliz.* that the Judge must certify the Action as frivolous, to strip the Plaintiff of his Costs: The plain Consequence of which is, That if there be several Counts in Trespass, and one relates to the Freehold, in which the Title may come in Question, and another relates to Chattels, *de Bonis asportat* in which no Title of Land can come in Question, and intire Damages be found under 40 s. the Plaintiff must have Costs, by the Statute of *Gloucester*, because the Costs are not remitted by the Statute of *Eliz.* without a Certificate from the Judge.

And this is not within the Statute of K. *Charles 2.* wherein there is a Necessity there should be a Certificate of the Judge, to intitle to Costs.

And therefore when entire Damages are found, there must be some Damage proportioned to that Count.

And if there be any Damage proportioned to the Count, relating to the Goods, that the Statute of *Gloucester* carries Costs of Course.

This, I say, to vindicate the Resolutions of the Law; for Men have thought, that some of the Resolutions, on the Statute of K. *Charles*, have oppugned the Statute, in Order to enlarge the Jurisdiction of *Westminster-Hall*. God forbid that Judges, upon their Oath, should make Resolutions to enlarge Jurisdiction. These are just and genuine Resolutions, according to the plain Intention and Meaning of these Statutes, considered one with another.

And all Resolutions, both antient and Modern, have turned upon this Reasoning. I'll only mention some of the modern Ones, because they come close to the present Case.

The First is,

Keen versus Whistler.

“ **T**RESPASS for chasing his Cow and his Domestick Fowls, ^{9 Geo. 1. Mich. in C. B.}
“ *viz.* Hens, Geese, &c. with Dogs ; which Dogs were used
“ to bite tame Fowl, by whose biting they were killed. On not
“ Guilty, Verdict for the Plaintiff ; and he had his full Costs, because
“ this is not a Trespass wherein the Right of Freehold may come in
“ Question.

The next is

Thompson versus Berry.

“ **T**RESPASS for breaking his Close, and chasing his Bull. ^{9 Geo. 1. Pasch. in C. B.}
“ Verdict for the Plaintiff, and 1 *d.* Damages : And the Question
“ was, If he should have any more Costs than Damages ; and held by
“ the Court, That he should have his full Costs, because the 22 &
“ 23 *Car. 2. Cap. 9.* extends only to such Actions of Trespass, where the
“ Freehold may come in Question : *Raym. 487. 3 Mod. 39.* And
“ how could the Freehold come in Question, on chasing a Bull.

Beck versus Nicholls.

“ **T**RESPASS of Assault, Battery, Wounding, and Imprisonment ; ^{10 Geo. 1. Mich. in C. B.}
“ as also, for entering and breaking his House, and opening the
“ Doors of the said House, and breaking three Locks and three Bars,
“ belonging to the said Doors. The Defendant pleaded Not Guilty
“ to all, except the Imprisonment : And for that he justifies ; and on
“ the Tryal, the Justification was found for the Defendant, and the
“ Not Guilty for the Plaintiff, and the Damages, 2 *s.* 6 *d.* and held by
“ the Court, That the Damages being under 40 *s.* he could not have
“ full Costs for the Battery, because the Judge had not certified the Bat-
“ tery to be well proved ; neither could he have full Costs for breaking
“ the House, &c. because this is a Trespass relating to the Freehold ;
“ the Construction of 22 & 23 *Car. 2. C. 9. Sect. 149.* having been, that
“ it extends to Trespass relating to the Freehold and Inheritance, and
“ to such Trespasses only ; which is collected from the Exception, where
“ the Judge certifies that the Title came in Question, which shews that
“ the Act extends only to such Trespasses where the Freehold might
“ come in Question, and not to Trespasses of Chattels.

Blunt versus Miller.

“ **T**RESPASS for breaking and entering, and breaking the ^{11 Geo. 1. Mich. in C. B.}
“ Plaintiff's House, and keeping the Plaintiff out of Possession
“ and Use of the said House, with a *Continuando* for a Month, whereby
“ the
E e e

“ the Plaintiff was put to great Expences to gain the Possession of
 “ his House ; and in the mean Time, lost the Profit and Use of his
 “ House. Verdict for the Plaintiff, and 2 s. 6 d. Damages ; and upon
 “ Motion for full Costs, it was decreed by the Court ; for this is a
 “ plain Trespass, *quare Clausum fregit*, and the *per quod* is only an
 “ Aggravation : And in this Case, the Title of the Freehold might
 “ have come in Question ; and if so, there should have been a Certi-
 “ ficate of the Judge, which not being in this Case, the Plaintiff can
 “ have no more Costs than Damages.

11 Geo. 1. Trin.
 in C. B.

“ **T**RESPASS *quare Clausum fregit*, & *quendum Taurum Per-*
 “ *sonæ ignotæ fugavit*, *per quod*, the Plaintiff's Gooseberry Bushes,
 “ *necnon quinque particas (Angl' Poles) in eod' claus' erect' officiat' & ex-*
 “ *istent fregit laceravit & spoliavit*. Verdict for the Plaintiff, and 1 d.
 “ Damages ; and on Motion for full Costs, the Court held, That these
 “ Words in this Declaration, did not import an actual Asportation,
 “ which must be an intire carrying away ; and that the taking and
 “ pulling up the Poles, was not such an Asportation : That this was a
 “ Case in which a Certificate might have been made, because the
 “ Freehold might have come in Question ; and though the Trespass
 “ begun by chasing the Bull, yet Damages is laid to be done to the
 “ the Freehold, and so the Title of the Freehold might there come in
 “ Question.”

My Brother *Denton*, who gave me this Report, says, That the Court doubted of the Case in 2 Vent. 215. which was Trespass *quare Clausum fregit*, for digging up, and carrying away his Trees ; and it was found upon Evidence, that they were Roots of Trees, and carried from one Part of the Ground to the other. The Court there doubted, whether this was finding an Asportation : For if the Jury only found that which was Evidence of an Asportation, and not an Asportation, it would not carry Costs.

But they agreed in the Principal Case, that if any Thing were carried off from the Grounds, though of never so little Value, 'twould be an Asportavit ; for the Words *Abcariavit*, & *Asportavit*, in Declarations, means such a carrying as amounts to a Conversion to the Defendant's Use.

So that where the Declaration, in *Clausum fregit*, breaking of Hedges, is laid by Way of Aggravation, that will not carry Costs.

2 Show. 258.

But in *Smith and Batterton*, Raym. 487. Trespass for breaking Stalls in a Market, they gave full Costs, because 'tis a Damage to a Chattel. For the Freehold of the Market could never come in Question in that Action. And it appears by 2 Jones, 232, that the Trespass was *quoad* the Goods only.

In the Case of *Barns and Edgar*, 3 Mod. 39, 40. where the Trespass is only for impounding, the Court would not allow full Costs, because the Freehold would not be in Question.

But in the Case of *Affer and Finch*, 2 Lev. where the Question was touching the Right of a Way, and that appeared by the Defendant's

Justi-

Justification, though the Plaintiff replies, That it was done *extra Viam*, yet the Defendant had full Costs. But this, though it was a Case quoted at the Bar, is not to our present Purpose, because there the Matter of Title appeared on the Record itself.

We come therefore now upon the Foundations and Principles before mentioned, to consider the Case before us. Though I doubted somewhat of it at the first, yet I am now clearly of Opinion with my Brothers, that there can be no more Costs than Damages.

In the present Case there is no Count, but where the Freehold might possibly come in Question: For this Count is for breaking the Barn, and locking up the Door of the House and Barn, and detaining several of the Plaintiff's Goods, mentioned in the Declaration, in that House and Barn.

Now here is no substantive and independant Count, *quoad* the Goods and Chattels, because 'tis connected with the breaking and locking up of the Barn; and in that Case, the Freehold of the Barn might come in Question; and then locking up the Goods in the Barn, is but meer Aggravation in that Count.

If a Man will put his Goods into my Barn, without my Leave, he can't enter and break my Barn in Order to come at his own Goods; and therefore upon this Count, the Property of the Goods might not be in Question, but meerly the Barn that was thus broken.

Another, and still a stronger Reason, in my Opinion, is, That it is laid by Way of *Detinuit*, and not by Way of *Asportavit*. For where 'tis laid by Way of *Detinuit*, he may detain it as a Distress, and *contra Vadios & Plegios*, and not by Way of Asportation and Conversion. And then, even on the Part of the Count, touching the Goods and Chattels, the Freehold might come in Question, and whether such Distress were lawful.

So that taking this as an Aggravation of the breaking of the Barn, as indeed it ought to be, the Freehold might come in Question in this Count.

Or if it had been put into an independent Count, in the *Detinet* only, and not by Way of Asportation and Conversion, such Count would not be good in Trespass, and therefore no Damages could have been recovered for it, and therefore there could be no Costs *de Incremento*, and consequently there can be no Costs in that Case.

I think it very proper to be considered by all Practisers, That if there be a Trespass upon the Freehold, and likewise a Count laid *de Bonis asportat* in Order so put in for the Costs meerly, if there be no Evidence of the carrying away of the Goods, and converting them, to take a Verdict of Not Guilty upon that Count: For then where the Jury bring in the Damages under 40*s.* the Plaintiff can't have Costs upon the other Count of the *Clausum fregit*, without the Certificate of the Judge.

I am exceeding clear, that in this Case there ought to be only ordinary Costs.

This was the Opinion of the whole Court, delivered by the Lord Chief Baron Gilbert.

The

The Case of Mary Shelmer's Will, and the Award of Baron Gilbert made thereupon.

The Case.
See the
Award *infra.*

MARY SHELMEY, Widow, by her Will, dated the 27th of August, 1722, gives to her own Nieces Gwyn, &c. 50 l. and after several other Legacies to her Husband's Relations, and also to her own more distant Relations, and particularly 100 l. to her Husband's Nephew Philip Gibbons, Esq; whom she made sole Executor, she gives a Direction in the following Words, concerning a House she held by a long Lease from the Town of Bedford, at a small Ground Rent, viz. *Also I will that my House in Bedford Buildings, with the Marbles and Cisterns thereto belonging, be sold by my Executor hereafter named, with all convenient Speed, and out of the Purchase Money thereby arising, I give to my Cousin John Loyd of Westminster 100 l. and if he should die in my Life-time, I give the said 100 l. to his Child or Children, equally to be divided between them.*

But says nothing touching the Money to arise by Sale of this House, proceeds and gives her own Niece Elizabeth Bernard, her Executors and Assigns, her Tenement in Fleetstreet, for the Remainder of the Term therein to come, chargeable with 20 l. apiece to her three Sons; to her own Nephew Owen Brigstock, Esq; she devises an Estate of Inheritance in Wales, subject to pay his Brother Will. 100 l. and after some other Legacies, she bequeaths to her Man and Maid-servant, in the following Words:

Item, *I give to my Servant Philip How 200 l.*

Item, *I give to my Servant Elizabeth Pilgrim 100 l. and all my wearing Apparel.*

Item, *I further give to the said Philip How and Elizabeth Pilgrim, all my Household Goods, Money and Plate, that I shall leave behind me at the Time of my Death undisposed of, and not bequeathed to others, my Funeral Expences, Debts and Legacies being first paid.*

Item, *To Mary her Servant 20 l. and to James her Servant 10 l. provided they respectively dwell with her at the Time of her Decease.*

And after these Bequests to her Servants, she gives several Legacies in Money, several specifick Legacies out of her Household Goods, and Plate to other Legatees, and particularly to her Niece Bernard, and to the Wives of her Nephews Brigstock several pieces of Plate, and to Mr. Gibbon her Executor, and his Lady, each a Diamond Ring, and to him a Pearl Necklace, and some Moveables, and to his Daughters, each a specifick Legacy.

Note.

The Testatrix gives about 70 specifick Legacies by her Will, 28 whereof preceded the said Bequest to her Servants Philip How and Elizabeth Pilgrim, and about 30 followed; and in the last Clause of her Will directed, that whatever Money she owed any of her Servants at her Death, either for Wages, or Notes under her Hand, should be paid them over and above their respective Legacies therein left them, and that her Servants living with her at her Decease, should be permitted to

continue

continue in her House one Month, next after her Décease, being the House in *Bedford Buildings*, directed to be sold, and of her Will, appointed the said Mr. *Gibbon* sole Executor, without devising or taking any other or further Notice of the Residuum of her Estate, except what is mentioned in the above recited Bequest to her Man and Maid, *Philip How* and *Elizabeth Pilgrim*, in the Middle of her Will.

The Testatrix owed none of her Servants any Money, besides a Trifle for Wages, (except to *Philip How*, to whom she owed 100 *l.* by Note, given to him for the Debt of another Person) and also the Ballance of an Account for Money laid out, besides what she owed him for Wages. Note.

Her said Man *Philip How*, had lived with her Husband and herself 26 Years, and her Maid had lived with her about 10 Years.

The Testatrix had three Sisters who died before her, but left Children living at the Testatrix's Death, viz. Mr. *Gwyn*'s Mother, Mr. *Bernard*'s Mother, and the Mother of the two *Brigstocks*; and these Nephews and Nieces are the next of Kin to the Testatrix, according to due Course of Law, and were most of them in good Esteem with the Testatrix.

The Testatrix during Life, was seized of an Estate of about 800 *l.* a Year, Part by Jointure, and Part by her Husband's Will, which she enjoyed from the Time of his Death, which happened about 26 Years before her own.

She dy'd the 7th of *September*, 1724, about two Years after making her Will, aged 77 Years or thereabouts; and 'tis thought she had at the Time of making her Will computed specifically, giving away as much as she was worth, and therefore did not close her Will with any Devise or Direction, concerning the Residue of her Estate.

The House in *Bedford Buildings* has been sold for 400 *l.* whereas she has but specifically given away 100 *l.* of that Money. Note.

And she died possessed of five or six hundred Pound *South Sea* Stock, and Annuities of a considerable Sum, due in Arrear for the Rent of her Freehold Estate, which she held for Life; and also for considerable Sums due to her upon Bonds and Mortgages.

She likewise left a considerable Quantity of Plate, undisposed of by her Will, and also 100 Guineas in ready Money in her House at the Time of her Death, so that the specifick Devise to her Servants *Philip How* and *Elizabeth Pilgrim*, (without taking in the Residuum of her Estate) will amount to near 400 *l.* apiece, which is much more than she has given to any other Legatee or Person of her Family, or her nearest Relations.

And 'tis thought the Testatrix intended her said Servants nothing more beyond their specifick Money Legacies, than Household Goods, Plate, and such ready Money, as should be in her Dwelling House at the Time of her Death, she usually having 100 *l.* or 200 *l.* in ready Money by her, and not even those, 'till her Debts and all her other Legacies were paid, because as by her Will, she has given several particular Legacies out of her Household Goods and Plate to other Persons; it was for that Reason she added in the Devise to her Servants *Philip*

How and *Elizabeth Pilgrim*, the Words (*undisposed, and not bequeathed to others*) and not with an Intent to give them the whole Residue of her Estate in general.

And this is the rather to be supposed from the last Clause in her Will, which declares that her Servants should be paid their Legacies over and above what she owed them for Wages, or by Note, and that they should live in her House a Month after her Death, which Clause was in a Manner useless, if she had intended the Residuum of Estate to *Philip How* and *Elizabeth Pilgrim*, the Testatrix having but four Servants at the Time of her Death, of whom they were two, and being little or nothing indebted to any of them, except to *Philip How*, in which Case *Philip How* would have had the Controul over her Dwelling-House in *Bedford Buildings*, as well as an absolute Power to himself, to secure his specifick Legacies.

Note.

The Residuum of the Testatrix's Estate, after Payment of her Debts and Legacies, will amount to 4 or 500 l.

Whether the Testatrix's Servants *Philip How* and *Elizabeth Pilgrim*, or the Testatrix's next of Kin, are entitled to the Residue of the Money arising by the Sale of the House in *Bedford Buildings*, and the remaining Part of the Residuum of her Personal Estate, or either, and which of them?

The Award.

I have considered of the Matter referred to me, between Mrs. *Shelmer's* Relations and Servants, touching her Will; and I am of Opinion, that the Word (*Money*) mentioned in the Bequest to the Servants in her Will, is a general Word, but yet not so large and comprehensive, as the Word *Pecunia* in the Roman Tongue; for such Word in that Language, *All the Testatrix's Substance, both Real and Personal, that can be converted into Money*; but the Word *Money*, in our Language, answers to the Barbarians Latin Word *Moneta*, and is a Genius that comprehends two Species, viz. ready Money, and Money due, that is to say, the Money in her own Hands, or her Money in the Hands of any Body else; and therefore in this Case, the Bequests to her Servants, will comprehend Mr. *Wood's* Mortgage, and the Arrears of Rent, since these must be looked upon by all the Rules of Construction, to be Mrs. *Shelmer's* Money, at the Time of her Death, but the Word *Money* will not comprehend *South Sea* Stock, or *Annuity* Stock, because that is an Interest arising out of Funds, settled by publick Laws; and though it be redeemable by Money, or saleable for Money, yet it can be no more looked upon as Money at the Time of Mrs. *Shelmer's* Decease, than a Term of Years, a Coach and Horses, or any other Real or Personal Chattel whatsoever can. And therefore I am clearly of Opinion, it can't be comprehended in the Word (*Money*.) I am likewise of Opinion, that the Money arising by the Sale of the House in *Bedford Buildings*, will not be comprised by this Bequest, because that was not Money left behind her at the Time of her Decease, for then it was a Chattel Real, and it could not by the Frame of the Will be sold, 'till a Month after her Decease, since the Servants are by an expresse Clause in the Will, to remain there, during that Time. I am therefore of Opinion, that the blended and liquidated Residuum, that is composed of all

all these Species that remain in the Hands of Mr. Gibbon the Executor, is to be divided in the Proportion, that the Relations Residuary Part, bears to the Residuary Part of the Servants. The Residuary Part of the Relations consist of the Annuity Stock; and this Money arising by the Sale of the House in *Bedford Buildings*, which is the first Proportion, by which the ultimate Residuum in Mr. Gibbons's Hands, is to be divided. The Residuary Part of the Servants, consists of Mr. Woods Mortgage, and the Arrears of Rent, and likewise the ready Money, which is not to be considered specifically, as a Part and Share due to the Servants at all Events; but as one of the *Items* that is to make a Part of the Computation of their Proportion, so that the second proportional to divide this blended Residuum, is the Residuary Part or Share of the Servants, and the Apportionment stands thus, as the Relations Part is to the Part of the Servants, so the Residuary Part in Mr. Gibbons's Hands is a fourth Proportional.

Note, This is to be computed by the Rule of Three, either Direct or Inverse; and accordingly the Shares of the Relations and Servants will come out by the aforementioned Additions.

Therefore I do award, order and determine, that the respective Shares be paid to the Servants, according to their Proportion, and that likewise the Residuary Part, or Share of the Relations be paid to them, according to this Proportion, but to be subdivided among them, according to the Statute of Distributions of Intestates Estates; and I do likewise order and determine, that the said Relations and Servants, upon receiving such their Shares and Proportions, shall give to the said Philip Gibbon, Esq; the Executor, proper Releases; and I likewise do order, that these Proportions be forthwith calculated, settled and adjusted, and the Award drawn up in Form, with all convenient Speed, Witness my Hand, this present 18th Day of December, in the 12th Year of the Reign of our Sovereign Lord King George I. in the Year of our Lord God, 1725.

Jeff. Gilbert.

Marriot *versus* Marriot.

IN this Case is observable Mr. Marriot, Master of the Exchequer of Pleas, made his Will, and left his Wife Executrix, and Residuary Legatee; his Sons were Plaintiffs in this Cause, and contended, that this Devise was gotten by fraudulent Means, and by Surprise; the Wife produced the Probate of the Will: And Council, in Behalf of the Wife, the Defendant, contended, *that the Probate of the Will was* conclusive Evidence, touching this Disposition of the Residuum; and that a Court of Equity could not look into the same, but that it was merely of Ecclesiastical Jurisdiction, and to be determined there.

The Argument of Lord Chief Baron Gilbert.
The Case of Mr. Marriot's Will, as to the Point of Ecclesiastical Jurisdiction.

And in this Question, four Things are considered.

First, How the Jurisdiction of the Testamentary Matters stood by the Civil Law.

Secondly, How it stood by the Canon Law.

4

Thirdly,

Thirdly, Upon what Foot it stood by the Law of *England*.

Fourthly, What have been the several Distinctions in our Law, touching this Jurisdiction.

First, How the Jurisdiction of the Testamentary Matters stood by the Civil Law.

Tract. Tractatum. Tit. 1. Fo. 38. N. 8.

The Way of authenticating Wills in the Civil Law, was first before the *Prator*, and afterwards before the *Magister Censu*; for they reckoned Wills to be in the Nature of Judgments in the Divisions or Distributions that a Man himself made, touching his Estate, and therefore they were shut up with the Magistrate, during the Life of the Person, for the Quiet and Repose of the Family, but were opened after his Decease; they were signed by the Testator, and sealed by him, and by the Witnesses upon a Thread, and carried into the *Prator*; after the Death of the Party, the Witnesses were called, if living, to acknowledge their Seals; if they were not living, then the Seals were broke, and the Will opened in the Presence of other sufficient Witnesses, and the Will was read and registered, and a Copy of it delivered over to any Person that would ask for the same; for it was reckoned as a Matter of Record, and therefore any Person might have Access to it. Of this, *Vid. Digest. Lib. 9. Tit. 3. de Testamentis quemadmodum Aperiantur, &c.* In the *Code, Lib. 6. Tit. 32.* And when any Legacy was disposed of to pious Uses, for the Use of the Church, or for Monasteries, or for the Poor, the Bishops were to sue for the same, and see to the Administration thereof; this appears by the *Code, Lib. 1. Tit. 3. Law 42. § 6. Vid. Necessarium § 7. Amplius § 8. si autem contigerit § 9. praterea Sancimus.*

Upon this the Bishops began to intermeddle with the Probate of Wills, which was a meer Temporal Authority; but this Invasion of the Prelates, *Justinian* would not endure, and therefore in his *Code*, he puts the Law against the Bishops Probate of Wills, before the Laws herein before mentioned; and in this *Code, Lib. 1. Tit. 3. Repetita promulgatione non solum Judices quorum libet Tribunalium verum etiam defensores Ecclesiarum hujus Almæ Urbis quos turpissimum insinuandi ultimas deficientium voluntates genus irreplerant præmonendos esse censemus de Rem aligunt quæ nomini omnium secundum Constitutionum præcepta præterquam Magistro Censu competit; absurdum enim Clericis est imo etiam oporticosum Temeroribus hujus Sanctionis pena quinquaginta Librarum Auri ferendi datum XIII. Kal' Dec' C. P. Justiniano A. 11. & Apiliano Cons. 524.* Thus Things stood before the Civil Law.

Secondly, We come now in the second Place, to see how Things stood by the Canon Law.

Tract. Tractatum. Tit. 14. Fo. 199. N. 88.

The Popes, as their Power encreased, endeavoured to get the Jurisdiction over Testaments, &c. This appears by the *Decret' Lib. 3. Tit. 26. C. 26. Si Hæredes Jussa Testamentoris non ad impleverant ab Episcopo loci illius omnis Res quæ eis Relicta est Canonice interdicatur, cum fructibus & ceteris Emolumentis, ut vota de Defuncti ad impleantur;* and likewise *Decret. Lib. 3. Tit. 36. de Testamentis C. 17. tua nobis fraternitas intimavit quod nonnulli tam Religiosi quam Clerici, Seculares, & Laici, Pecuniam & alia Bona quæ per Manus eorum ex Testamentis decedentium*

dentium debent in Usus pios expendi non dubitant aliis usibus applicare: Cum igitur in omnibus piis voluntatibus sit per Locorum Episcopos providendum ut secundum defuncti voluntatem universa procedant licet etiam a Testatoribus id contingerit interdici Mandamus quatenus Executores Testament' huiusmodi ut Bona ipsa fideliter & plenarie in Usus predict' expendant monitione premissa Compellas. Pope Innocent the IVth, upon this Law, Fo. 152. says, that the Bishop may dispence this Charity, if there be no Executor appointed by the Will, and if there be an Executor, and he don't fulfil the Will, that then he may take it to himself, *Decret' Lib. 3. de Testament' Tit. 26. C. 19. Johannes Clericus & P. Laicus Executores ultime voluntatis.* O Clerici Sanctæ Crucis qui venerabilibus Episcopis locis de Bonis suis in ultima voluntate legavit mandans inde supersatisfieri Creditoribus per eosdam post' mandatum susceptum per Diocesanum Cogi debent' Testatoris explere ultimam voluntatem. See Innocentius in *Legem* 153. Panormitan, upon the Law of *Si Hæredes* says, that this Matter of Wills, even where the Devise is to pious Uses, is *mixti fori*, and that the Heir or Executor is to have a Year's Time to fulfil the Will, before he can be compelled to do it by Ecclesiastical Censure.

Panorm.
Tit. 4.
Fo. 157.

Upon the same Law *tua nobis*, Panormitan says, that the Bishop is to compel by Ecclesiastical Censure the Executor, to the Performance of a Will to pious Uses, although the Will itself says, that the Bishop was not to intermeddle; for they look upon that as an irrational Part of the Devise, which is in itself void.

ibid. Fo. 176.

The last Chapter *verbo Johannes*. The Case as Panormitan states it was, where after Debts paid, the Residue was left to pious Uses, and then the Bishop was to compel the Payment of Debts, and afterwards to see the Disposition of the Residuum; I don't find that any of the Canonists pretend, that Wills are of Ecclesiastical Conuzance, *sua natura*, but only such Wills as were made for pious Uses. And

Note.

Lynwood, Fo. 174. Verbo approbatis says, that the Jurisdiction of the Ecclesiastical Courts, touching Testamentary Matters, is by the Custom of England, and not by the Ecclesiastical Law.

We are thirdly to consider upon what Foot the Ecclesiastical Jurisdiction stood by the Law of England.

In England, the Bishop and Sheriff sat together in the County Court, as it appears by the Laws of King Eadgar, Cap. 5. *de Comitibus. Centuriæ Comitibus quisq; (ut ante prescribitur) Interesse; Oppidana ter quotannis habentur Comitibus; celeberrimus autem ex omni Satrapia bis quotannis Conventus agitur cui quidem ill' Dioecesis Episcopus & Senator.* And, *inter sunt, quorum alter Jura divina alter humana populo edoceat' Leges Canuti C. 17. de Comitibus Municipalibus; Ter in Anno habeantur Comitibus Municipalia, & duo Conventus (aut plures etiam) ex omni Provincia, & illis intersint Epus' & Senator' & ibi ubique doceatur tam Jus divinum quam humanum,* from these Laws, it plainly appears, that the Probate of Testaments was in the County Courts.

Wilkins 78.
Lamb. Saxon
Laws 64.

ibid. 136.
Lamb. Saxon
Laws, 111.

William the Conqueror was the first that separated the Ecclesiastical Court from the Civil. Selden, in his Notes upon Eadmer's 167, gives us the very Charter of such Separation, *Propterea mando & regia auctoritate præcipio, ut nullus Epus' ut Archidiaconus de Legibus Episcopali-*

bus amplius in Hundredo placita tensat, nec causam quæ ad Regimen animarum pertinet ad iudicium secularum Hominum adducant. This Charter, as Mr. Selden has told us, was recited in a close Roll of Richard II. and then confirmed; but the Charter of William I. does not mention Matters Testamentary, or the Probate of Wills to be of Ecclesiastical Conuzance, but only says that the Crimes that were to be prosecuted *Pro Salute Animæ*, were to be of that Conuzance.

That which seems first to have given Birth to the Ecclesiastical Jurisdiction, was the Charter of Hen. I. which says, *si quis Baronia vel hominum meorum infirmabitur sicut ipse daret vel dare disposuerit pecuniam suam ita datum esse concedo quod si ipse confectus vel armis vel infirmitate pecuniam suam nec dederit nec dari disposuerit Uxor sua sive liberi aut parentes & legitimi hæredes sui pro anima ejus eam decident.* This let in the several Canons herein before mentioned into England; for since the Personal Estate was to be disposed of for the good of the Soul, they looked upon every Will to be a Disposition of the Testator in a gratuitous or charitable Manner; that whatever was left, was to be disposed of by the Executor, for the good of his Soul, so that all the Canons touching charitable Dispositions, were to take Place in England.

In the Time of Richard I. when he was in Confinement, the Clergy got a Confirmation from him, of the Ecclesiastical Immunities; this is mentioned by *Mat. Paris*, 161. Item, *Distributio rerum quæ in Testamento relinquitur Authoritate Ecclesiæ fiet nec decima pars ut olim subtrahetur si quis enim subitanea morte vel quolibet casu præoccupatus fuit, ut de rebus suis disponere non possit distributio Bonorum ejus Ecclesiastica Autoritate fiet.*

This Charter is likewise mentioned in the same Terms in *Radulphus de Diceto* one of the *Decem Scriptores*, Fo. 658; these Ecclesiastical Immunities were confirmed by the Pope, and the Confirmation appears in *Vol. 1. Fredra.* 104. though there is no express Mention of a Testamentary Jurisdiction.

Note, Also it appears by the Charter, that the King releases the Tenth that used to be taken on the Death of the Tenant, and thence forward the King and his Lords only took Herriots, as an Acknowledgment in Lieu of such Decimation.

From henceforth, the Ecclesiastical Court began to consider a proper Method for the Publication of Wills; therefore when any Person died, they summoned in the Executor, or next Relation, to take Care of his Soul, and the Executor was obliged to bring in the Will, and both Executors and Administrators were obliged to bring in an Inventory of his Goods, and the Charges were lightened by the Canons, in order to bring every Thing into the Ecclesiastical Court, *Lynwood* 176. Canon of *Simon Mepham*: And it appears by the Canons of *Stratford*, that the Residue in the Hands of the Executor, was to be distributed for the good of the Soul, *Lynwood* 178, and by the Canons of *Ottobon*, an Inventory was to be exhibited, *Lyn.* 167.

Notwithstanding all this, the Jurisdiction of the County Court still continued, for this was acknowledged to be a Matter *mixti fori*, and therefore they could not hinder the County Court from proceeding, even according to their own Canon Law.

But

But in order to get the whole Jurisdiction in the Time of *Richard II.* as is mentioned by *Selden* on his Notes on *Eadmerus*, they got the King to publish the Law of *William the Conqueror*, and confirm the same, that no Matters of Ecclesiastical Conuzance should be transacted in the County Courts; this is the Charter of 2 *Richard II.* *Membrano 12. N. 5.* and is mentioned in *Selden's Eadmerus 168.*

From hence forward the Clergy had the whole Jurisdiction of Wills, because the County Court could not receive the Probate, &c. and the King's Court had never intermeddled with it, because by the Charter of *Hen. I.* herein before mentioned, and likewise by *Mag. Chart. Cap. 18.* the King had granted the Liberty to his own Tenants, to dispose of their Goods, and therefore the Will touching the Personal Estate, never received any Sanction in the immediate Court of the King.

This reconciles that Case of *Fitzberbert, Abr. Tit. Testament, Fo. 148.* where 'tis said by *Fairfax*, that it was but of late the Church had the Probate of Wills, which was by an Act, (I suppose he must mean the Confirmation of *Richard II.* herein before mentioned, for there is no Act of Parliament that gives them that Probate) and he says that in other Countries, the Probate was of Temporal Conuzance, which *Shelden* notes to be true in all Countries except *France*; and *Tremaile*, in that Case, asserts the Usage of proving Wills in Courts Baron, which certainly may be where the Custom prevails.

In the 11th of *Hen. VII.* *Fineux* asserts, that the Probate of Wills did not belong to the Spiritual Court by the Ecclesiastical Law, but came to them by Custom and Usage, and these are the Foundations on which my Lord *Cooke* in *Henslow's Case 9, Rep. 38.* concludes, that when the Will is proved in the Ecclesiastical Court, the Court has executed its Authority; but the Executors are to sue in the Temporal Courts, to get in the Estate of the deceased.

Note

Fourthly, We are to see what have been the several Distinctions in our Law, touching this Jurisdiction, which will fall under five Heads.

First, That the Spiritual Court is the only Court now, that has Authority to receive the Probate of Wills, and to give a Sanction to them, because the Jurisdiction of the County Court is lost by Non-usage, and since *Magna Charta, C. 18.* the Kings Courts did not intermeddle with the Goods of a deceased Tenant. But here must be excepted all Courts Barons that have had Probate of Wills Time out of Mind, and have always continued that Usage.

Secondly, The Seal of the Ecclesiastical Court does authenticate the Will; for there the Will is to be brought in and proved; and therefore the Case in *Raym. 406, 407.* is certainly good Law, that the Seal of the Ordinary, can't be contradicted, because if there be no Way in the Temporal Courts to prove the Will relating to Chattels, it must go on in the Spiritual Court, and the Determination there must be final; for the Temporal Courts can't make a Judgment concerning the Will, contrary to what was made in the Ecclesiastical Court; and therefore it is certainly good Law, that if they shew a Probate under the Hand of the Ordinary, they can't prove in Evidence, that the Will was forged or that the Testator was not *Compos*, or that another Person was Executor;

3 Roll. 299.

Executor ; but they may give in Evidence, that the Seal was forged or the Will repealed, or that there were *Bona notabilia*, because that is not in Con tradition to the real Seal of the Courts, but admits the Seal, and avoids it, *Lev.* 235, 6. *Vaugh.* 207. 1 *Show.* 293, and since the Ecclesiastical Court has the Probate of Wills now settled by Custom, the Temporal Court can't prohibit them in their Inquiries, whether the Testator was *non compos* or not, or whether the Will be revoked or not, because that is necessary for the authenticating the Will, *Hard.* 131, 313.

3 If a Temporal Matter be pleaded in Bar of an Ecclesiastical Demand, they must proceed in the Ecclesiastical Court, according to the Temporal Law, or else the Temporal Courts will hinder them ; as if Payment be pleaded in bar of a Legacy, and there is but one Witness which the Ecclesiastical Court will not admit, there the Temporal Courts will prohibit them, because it is a Matter Temporal, that bars the Ecclesiastical Demand. *Shutter and Ux' versus Friends. Show* 158, 173. 1 *Vent.* 291. 3 *Mod.* 283. but if upon a Probate of a Will, they alledge on the other Side, that the Will was revoked, and they would prove the Revocation by one Witness, according to the Resolution in *Telv.* in the Case of *Brown and Wentworth, Fo.* 92 or 96, (which is but that of three Judges against two, and seems against the Opinion 2 *Rolls Abr.* 299.) they might be prohibited ; this seems to intrench upon their Jurisdiction ; for if they can't judge by their Law, whether the Will is revoked or not, they can't judge whether there is a Will or no Will. Indeed the Judges there say, that the Revocation is a Temporal Matter, and therefore it is to be proved according to their Law by one Witness ; but then we don't suffer them to determine, touching the Validity of a Will of a Personal Estate, which every Body allows to be of Ecclesiastical Conuzance. But if the Spiritual Court do admit a Will, but yet will not give the Probate to the Executor, because he can't give Security for a just Administration, it seems that a Mandamus will lye ; and this was resolved in the Case of the King, and Sir *Richard Raines, Mich.* 10. *W. in B. R. M. S. Rep. Fo.* 1. for though they are to determine whether there be a Will or not ; yet if there be a Will, the Executor has a Temporal Right, and they can't put any Terms upon him, but what are mentioned in the Will ; and therefore if they will not grant the Probate, where they admit there is an Executor, the Court will grant a Mandamus.

4 If a Man gives Lands to be sold, for the Payment of Debts, and disposes of the Money to several Persons, that can't be sued for in the Ecclesiastical Court, but only in a Court of Equity, because that is not a Legacy meerly of Goods and Chattels, but it arises originally out of Lands and Tenements, and they have a Testamentary Jurisdiction, touching Chattels only, *Hob.* 365. *Case* 345. 2 *Roll.* 285.

The Courts of Equity can hold Plea concerning a Legacy, and likewise concerning the Devise of a Residuum, which is but a Legacy ; they may in notorious Cases declare a Legatee that has obtained a Legacy by Fraud, to be Trustee for another, as if the Drawer of a Will should insert his own Name, instead of the Name of a Legatee, no Doubt he would be Trustee for the real Legatee. As to the Devise of the

the Residuum, nothing can be more clear, for since the Case of *Foster* and *Munt*, 1 Vern. 473. wherever an Executor hath had a specifick Legacy, he was looked upon as a Trustee of the Residuum for the Relations, in a Course of Distribution, and Nobody ever attacked these Decrees in Favour of the Relations, upon this Head of Argument, that they were contrary to the Ecclesiastical Jurisdiction. See 2 Vern. 648.

But in all Cases, a Court of Equity must consider what was the Real Intent of the Testator; and they can't declare a Trust according to their own Fancy, nor according to what the Testator should have willed; for then they make the Will, and not the Testator; but they may according to the Real Intention of the Testator, declare a Trust upon such Wills, although it be not contained in the Will itself, which is in these three Cases.

First, In the Case of a Fraud upon a Legatee, as before is mentioned.

Secondly, Where the Words imply a Trust for the Relations, as in the Case of a specifick Devise to the Executors, and no Disposition of the Residuum.

Thirdly, In the Case of the Legatees promising the Testator to stand as a Trustee for another.

And Nobody has thought that declaring a Trust in these Cases, is an Infringment upon the Ecclesiastical Jurisdiction.

N. B. This Cause was agreed; but if the Point of Jurisdiction had been insisted on by the Executrix, my Lord Chief Baron Gilbert had prepared this Argument,

John Edwards *versus* Richard Hughs & al'.

THIS is an Action of Trespas for taking away two Steers. To this the Defendants plead, that *William Morgan* was seized of the Manor of *Brecon*, in his Demesne as of Fee, and that the said *William Morgan*, and all those whose Estate he had, had Time out of Mind within the said Manor, a Court-Leet, or View of *Frankpledge* three Times a Year, viz. on *Monday* next, after the Close of *Easter*, on *Monday* next, after the Feast of *St. Michael*, and on *Monday* next after *St. Hillary*: That in the Manor there was a Custom, that every Tenant of every Freehold Tenement within the said Manor, used and ought to appear Personally, without any Notice or Summons once in every Year, at one of the said three Courts of View of *Frankpledge*, so to be held; and if he did not appear at the two other Courts, then he was to pay the Steward for the Use of the Lord of the Manor, an Essoign Penny for each of the two said Courts for his Default; and that every such Tenant not appearing at either of the said three Courts, was to be amerced by the Steward for his Default 7 s. for each of the said three Courts; and that every Tenant being lawfully summoned to appear and enquire, and present upon Oath all such Matters, as ought to be enquired into and presented, and therein making Default, was to be amerced by the Steward for his Contempt at 7 s. and that the Bailiffs

On a customary Distress, on an Amerciament for not appearing, and serving at a Court-Leet. Of assening Amerciaments, &c.

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of the said Manor, by the Warrant of the Steward, should levy these Amerciaments by Distress and Sale of the Goods and Chattels of the Defaulter.

And the Defendants further say, that *John Edwards* then, and for three Years before, was a Tenant of a Freehold Tenement, and Resident, and inhabiting within the said Manor, and that there was a Court held on *Monday* next, after the Close of *Easter*, viz. upon the 25th of *April*, in the 6th of the King, and that the Plaintiff was lawfully summoned to appear, and to be put upon the Jury, to present all Things presentable within the said Manor; and that the Plaintiff did not appear, for which he was amerced by the Steward at 7 s.

And that at the second Court held on *Monday* after *Michaelmas*, viz. the 3d of *October*, in the 7th of the King, the Plaintiff was summoned to appear, and be on the Jury, but did not, and for that Default, was amerced another 7 s.

And that the 3d Court was held the *Monday* after *Hillary*, viz. the 16th of *January*, in the 7th of the King; and that the Plaintiff was lawfully summoned to the said Court, to be on the Jury, and made Default, for which the Steward amerced him another 7 s.

And because he did not appear, and pay his *Essoign Penny* for his Non-Appearance, according to Custom for this Default, the Steward amerced him another 7 s.

And for not paying his several Amerciaments, *Hughes* the Steward directed his Precept to *John Pitchard*, *Thomas Loyd*, *John Meredith*, and *John Powell*, which was delivered to them, by Virtue of which, they took the two Steers (in the Declaration mentioned) as a Distress, and levy'd on the said Steers the several Sums, amounting to 1 l. 8 s. to the Use of *William Morgan*, the said Lord of the Manor, and sold them to certain Persons, to them unknown for 5 l. as they lawfully might, and paid the said 1 l. 8 s. to the Lord of the Manor, and were ready, and offered to pay the Overplus to the Plaintiff, which he refused to receive, which is the same Transgression, of which the Plaintiff complains.

The Plaintiff replies *de Injuria sua propria*.

To this the Defendant demurs.

The Question in this Case is, Whether the Custom is good?

And we are of Opinion, that this Custom is not good for many Reasons.

First, Because this Amerciament is not assented.

Amerciaments to be assented.

By the Statute of *Magna Charta*, Cap. 14. it is directed expressly, that *nulla prædictarum Misericordiarum ponatur nisi per Sacramentum proborum & Legalium hominum de vicineto*.

And by 27 Hen. VIII. C. 26. all Laws and Statutes in *England* are to run in *Wales*.

And so if this Custom be against *Magna Charta*, it is as much abolished in *Wales* as 'tis in *England*.

The Statute of *Mag. Chart.* was intended to take away all Fines and Amerciaments, at the Will and Pleasure of the Lord and his Steward, and

and likewise all excessive Fines and Amerciaments, if they were never so certain.

For before this Charter of Liberties, the Lords used to set such excessive and grievous Amerciaments on their Tenants, that under Pretence of such Amerciament, they used to seize the whole Profit of the Tenement, which they had granted.

To hinder this Oppression, *Magna Charta* appoints, that every Amerciament should be affeered.

This has been so understood, that though a Court may award, that the Party shall be amerced, yet the Quantity of the Amerciament is to be settled by the Affeerers, and they are particularly sworn to that Purpose.

And they are called Affeerers, because they do affere, or bring in the Quantity of the Amerciament.

In a Court Baron, where the Suitors are Judges, the Homage may present the Defaults on small Trespasses within the Manor, but the Amerciaments must be afterwards particularly affeered by the Affeerors, *Hob. 129.* and *Kitchen 153* says, that the Office of the Homage, and that of the Affeerors are not to be confounded.

The Homage are to present the little Offences and Trespasses within the Manor, as *Kitchen* says, but the Affeerors are in Nature of Trustees, to settle the Quantity of the Amerciament.

Indeed *Hob.* goes so far as to say, that the Homage may set a Sum upon the Offence, but the Affeerors are then to mitigate it so, that the Quantity of the Amerciament is totally to be settled by the Affeerors.

And so in the Courts above, where Amerciaments were ordered either against Plaintiff or Defendant, they were carried down to the Coroner, to be settled and affeered.

In a Court-Leet, which was a Court of Record, if an Amerciament was imposed, if it were affeered even by the Jury, and not by sworn Affeerors appointed for that Purpose, it was a void Amerciament, and the Lord of the *Leet* could not maintain his Action for it, *3 Lev. 206.*

'Tis very reasonable there should be such an Affeerment; for in this very Case, 'tis very possible the Tenant might not have been summoned, and that this might come to the Knowledge of the Affeerors, and that would be an Excuse for this Default.

Objection. This is an Amerciament in Nature of a Fine, and a Fine may be set by the Court without any Affeerment.

Answer. 'Tis true, a Fine may be set without Affeerment, because it is out of the Statute of *Mag. Chart.* for the Statute of *Mag. Chart.* don't comprehend the Cases, where a Court of Justice may imprison, and where the Fine is set by Way of Mercy as a Ransome and Purgation of the Offence; for the Statute was designed in Mercy to the Offenders, and not to hinder them from Mercy; and so did not extend to Offences that might be punished by Imprisonment.

So in all Breaches of the Peace, the Court may set a Fine.

And so for all Contempts, because the Court may imprison.

So a Steward of a Court-Leet may impose a reasonable Fine, for a Disturbance committed in *facie curia*, which is *Grieff's Case, 30. 39.*

And

Q. If Fines were not an Invention of the Judges, to avoid the Statute of *Mag. Chart.*

And so he may, if a Suitor will not be sworn on the Homage, because in those Cases the Steward may imprison, as is expressly resolved in *Fitz. Abr. Tit. Leet. N. 4. Dalton Sher. 400.* and when such a Fine is imposed, it becomes a Debt to the Lord, for which an Action of Debt lies, *Cro. El. 581.*

Nobody can say that a Default for not appearing in a Court-Leet, is such a Default, upon which a Steward may imprison the Party, and so can't set a Fine as a Ransome from Imprisonment.

But it is said, that this may be good by Custom: Now, as to the Custom, that is in the very Teeth of *Mag. Chart.* for it's a Custom to amerce without Affeerment; and this Statute was made to abrogate and abolish such Customs.

Secondly, Another Reason against this Custom is, that the Amerciament is too excessive, it is not *salvo contenemento*.

Now if the Amerciament was so great, as to sweep away the whole Profits of the Freehold of the Offender, it was too great.

As if he were a Sockman, and it extended to take away the Beasts of his Plough.

If he were a Military Man, and it extended to take away his Arms.

If he was a Merchant, if it extended to take away his Merchandize.

If he were a Villain, if it took away his Cart or Wainage.

All these Amerciaments were too grievous, and against the Statute of *Magna Charta*, which says *liber homo non amercietur pro parvo delicto; nisi secundum modum illius delicti; & pro magno delicto secundum magnitudinem delicti salvo sibi contenemento suo, & mercator eodem modo salva Merchandiza sua & villanus ulterius quam noster eodem modo amercietur salvo homagio sua & si amercietur sit in miserecordia nostra.*

And this makes an essential Difference between a Fine and an Amerciament, for the Amerciament is to be set, as that he may sustain his Station as Feudatory to his Lord; but the Case of a Fine has no Relation thereunto, for where the Offender is imprisoned, he can't sustain that Station.

This Case is among the *Minora Delicta*, and as such, there should be only an Amerciament, and that reasonable.

But according to the Custom, it may happen that the Amerciament may sweep away the whole Profit of the Tenement.

For a Man that has but a Rood of Land, or a Tenement of 5 s. per Ann. must be obliged to pay 1 l. 8 s. for his Default.

Lord Coke, in 2 *Inst. Fo.* 28. expounds the Words of the Statute in such a Manor, that the Amerciament must not destroy the Livelihood of the Offender; but such Amerciaments as these in ancient Times, would certainly have been thought very exorbitant before the Quantity of Money was so very much encreased; and even at this Day, the Fine would swallow the annual Profit of a small Tenement.

Thirdly, Another Reason against the Amerciament here is, that it admits of no Essoign, to excuse the Default.

Now there are several Essoigns, that excuse even an Appearance at the King's Courts upon Demand, as the Essoign *de malo lecti, de malo veniend, de servitio regis, &c.*

But

But here at this Court, if a Man were summoned, and were taken ill the Day before the Leet, or were sent for into the Service of the King, this was to be no Excuse, but immediately the Amerciament was to run upon him.

Now this is perfectly against Reason, because these Essoigns excuse these Defaults; but here by this Custom, he is to be amerced, even where the Law excuses his Non-Appearance.

Fourthly, It is not *secundum modum delicti*, because the Non-Attendance of a poor Man, or Day Labourer, is a less Fault, than of a rich Man that has his Time to command.

And the Statute was made on Purpose, to proportion Punishments to the Default, but this Custom runs alike upon all Defaults, small and great.

This is contrary to that known Rule, *i. e. Regula peccatis quæ penas irrogat Equas.*

Objection. But though they say that this can't be maintained as an Amerciament, yet it might begin by Tenure, and the Lord might settle what Sum he pleased, on making Default at his Leet, and then such Sum ought not to be reckoned excessive, and subject to Affeerment, because it was settled in the original Settlement of the Tenure.

Answer. First this is pleaded as an Amerciament for a Default, and not as a Sum due by Tenure, and we must take it as it was pleaded, and not by any Imagination out of the Plea.

Secondly, If it were due by Tenure, it must be laid upon the Lands and Tenements in Certain, and not Personally upon the Tenant, because upon the Contingency, it will be a Sum issuing out of the Lands.

Thirdly, This could never grow into a Custom, because upon any Alienation of Part of the Lands, or any Division of the same upon Descent, the Sum must be divided, and could not remain the same entire and uniform Sum.

This was the Opinion of the Court, delivered by Lord Chief Baron Gilbert.

East-India Company against Mathews.

THIS is an Information exhibited by the *East-India Company* against *Thomas Mathews*, on the Statute of 9 and 10 *W. III. C. 44.* and sets forth, that the Defendant between the first of *April*, 1722, and first of *June*, 1724, being a Subject of this Kingdom, and being neither Factor nor Agent, or Servant of the said Company, or thereunto licensed by the said Company, nor having any lawful Authority, did trade and traffick, *ad & in India Orientali*, and divers other Places within the Limits, where none, except the said Company, their Factors, Agents or Servants, or Persons by them authorized, ought to exercise any Trade or Merchandize, and did acquire Goods to the Value of 3000 *l.* in the *East-Indies*, and other Places within the Limits and Time aforesaid, and the said Goods did put on Board the *Lyon* and *Fancy*;

Fancy ; which said Ships, with their Furniture, valued at 5000 *l.* and with these Goods so put on Board, did trade, traffick and adventure ; the Proceed and Effect of which was to the Amount of 15000 *l.* for which Offence they claim the Forfeiture of the said Ships, and all the Proceed and Effects of the same, and also the Sum of 6000 *l.* being double the Value of the Goods.

To this Information, the Defendant pleaded not guilty, as it was try'd, and a special Verdict was found.

That on the 23d of *January*, 1720, the Defendant *Thomas* was appointed Commander of a Ship called the *Lyon Man of War*, and three other Ships which were sent out for the Security of the Trade of the *East-India* Company from Pyrates, and for that Purpose, the Defendant received several Instructions from the Lords of the Admiralty, and among other Things, that he should take Care that neither himself, nor any of the Officers in Company, belonging to any of his Majesty's Ships under his Command, should take on board any Goods or Merchandizes upon any Pretence whatsoever, (Gold and Silver only excepted) as he and they should answer the same at their Peril ; and that on the Receipt of these Instructions, the said Defendant sailed from *England* for the *East-Indies*, in the said Man of War, called the *Lyon*, and on the 30th of *March*, 1721, arrived there, and that after his Arrival, being neither Factor, Agent nor Servant unto the said Company, nor being thereto licenced by the said Company, he did trade with the said Ship at the *East-Indies*, and other Places within the Limits, in the Information mentioned, from Port to Port, and from Place to Place, and acquired Goods to the Value of 13,676 *l.* 17 *s.* 6 *d.* and that the said Goods were shipped on board the *Lyon Man of War*, (Value 20) within the Limits aforesaid ; and whether this is within the Act, is the Question.

In Order to consider this Case, it will be proper to look into the State of Things, at the Time of making this Act.

There was then an old *East-India* Company incorporated by Charter, but the Charter of the Crown could not exclude any Person to and from the *East-Indies* ; for nothing can exclude the Subject from Trade, but an Act of Parliament.

The Crown, at the Time of making the Act, had Occasion for two Millions of Money, for carrying on the War, and the Act is a Plan for raising that Sum in this Manner :

Books are to be laid open to Subscribers, for raising these two Millions, and every subscribing Person, both Subject and Foreigner, is to have an Annuity of 6 *l.* per Cent. and a Fund is settled.

Besides, such subscribing Persons have a Right to Trade, within certain Limits, exclusive of all others, from the Cape of *Good Hope*, to the Streights of *Magellan* ; so that the new Right, purchased by Subscription, in pursuance of the Act, is a Right to exclude every unsubscribing Person.

Those that have argued for the Defendant, do admit, that the Power of trading to and from the Limits, is taken away from all unsubscribing Persons, but say, that the Right of trading Coast Ways within the Li-

mits,

mits, is not taken away by this Act, that is a *Casus Omissus*, and not within the Law; so that if a Man does not pass the Limits, or transport any Wares, Commodities, Coin or Bullion from a Place out of the Limits, to a Place within the Limits, he is not within the Letter of the Law.

If it were so, that the Coast Trade were a *Casus Omissus*, and out of the Letter of the Law, I could not construe it to be within the Intent, for that were to torture a Penal Law, by excluding it in Point of Construction; and if there be a *Casus Omissus*, the Parties concerned in Interest, had better apply to Parliament, which are sitting every Year, than for the Judges to stretch the Law in Point of Construction.

So that the Question is reduced to this, Whether the Coast Ways Trade is within the Letter of the Law.

Now plainly the 61st Section does grant a Coastmans Trade to the Subscribers, as well as a Trade to and from the Limits, for it is, that they shall freely traffick, and use the Trade of Merchandize, in such Places, and by such Ways and Passages, as are already frequented, found out or discovered, or which hereafter shall be found out or discovered; and as they severally shall esteem and take to be fittest or best for them, into and from the *East-Indies*, in the Countries and Parts of *Asia* and *Africa*, and into and from the Islands, Ports, Havens, Cities, Creeks, Towns and Places of *Asia*, *Africa* and *America*, or any of them beyond the Cape of *Bona esperanza* to the Streight of *Magellan*, where any Trade or Traffick of Merchandize is, or may be used or had, and to and from every of them.

Indeed, if there were no more in the Act than this Grant, it would have given them no more, than what they had as Subjects originally, and before the making of the Act; for they had a Power of trading to and from the Limits, and likewise a Power of trading Coast Ways; so this Case is only Preparatory to the 81 Clause, which runs thus:

That such Persons or Corporations as in Pursuance of this Act, shall have a Right and Power to trade to the *East-Indies*, and other the Parts aforesaid, according to such Provisions, Proportions and Restrictions, as are in this Act contained, and subject to the Condition or Power of Redemption before mentioned, from and after the Date of the said 29th of *October*, 1689, shall have, (sell) use and enjoy the whole and sole Trade and Traffick, and the only Liberty, Use and Privilege of trading, trafficking or exercising the Trade or Business of Merchandize, to and from the *East-Indies*, and other the Parts aforesaid, according to such Provisions, *viz.* to and from all the Islands, Ports, Havens, Cities, Towns and Places within the Limits aforesaid, or any of them, as shall after the said 29th of *October*, 1698, be visited, frequented, or haunted by any other of the Subjects of his Majesty, his Heirs or Successors, during such Time as the Benefit of Trade hereby given, or intended to be given to the Subscribers or others, as aforesaid, ought to continue by Virtue of this Act. And if any the Subjects of his Majesty, his Heirs or Successors, of what Degree or Quality soever they be, other than such as may lawful go and Trade to the *East-Indies*, or other the Parts aforesaid, by Virtue of this Act, and their Factors, Agents or Servants

vants respectively who shall be employed according to the true Meaning hereof, shall directly or indirectly, visit, haunt, frequent, trade, traffick, or adventure into or from the said *East-Indies*, or other the Parts before mentioned, contrary to the true Meaning thereof, all and every such Offender and Offenders shall incur the Forfeiture and Loss of all the Ships and Vessels which shall be employed in such Trade, with the Guns, Tackle, Apparel, and Furniture thereunto belonging; and also all the Goods and Merchandize laden thereupon, and all the Proceed and Effects of the same; and also double the Value thereof, *viz.* one fourth Part thereof to such Person or Persons as will seize, inform, or sue for the same, to be recovered in any Court of Record as aforesaid; and the other three-fourth Parts to the said general Society, until, &c. as aforesaid; and after the erecting (uniting) thereof, if any such be, then to the Use of the said Company without Account, the Charges of Prosecution being born by the said Society or Company.

If the 61st Clause had stood alone, without the 81st, it would have been no Grant at all; for the 61st would have granted no more than that which all Subjects had before the Making the Act; but the 81st is the effectual Clause which excludes all other Subjects, in as large Terms as the 61st Clause grants the whole and sole Trade to and from the *East-Indies*, and to and from all the Islands, Ports, Havens, Cities, Towns, and Places within the Limits, and then came the Words which inflict the Penalty, which say, That if any Person, of what Degree or Quality whatsoever, shall directly or indirectly, visit, haunt, frequent, trade, traffick, or adventure to and from the *East-Indies*, or other Parts afore-mentioned, contrary to the true Intent and Meaning thereof, they shall incur the Forfeiture, &c.

So that the Words of the Law do as well extend to the Trading within the Limits, as to and from the Limits: For trade, traffick, and adventure to and from the *East-Indies*, and other Parts afore-mentioned, are relative Words, and relate to any Island, Port, Haven, City, Town, or Place within the Limits.

I cannot see how plainer Words could have been made Use of, both to grant a Coast-way's Trade to the Subscribers, and to exclude all other Subjects from it. And indeed the Grant would have been nothing, if the Exclusion had not been equal and parallel to the Grant; for the Subscribers would have no more than they had before, if all other Subjects had not been excluded; and so it was necessary to pen the exclusive Clause in these strong Terms, in Order to make the Grant itself any Way effectual.

There is another Clause that manifests the same Intent; I cannot say it makes it plainer, for no Words could, I think, be plainer, and that is Clause 83. Provided also, and be it enacted by the Authority aforesaid, That nothing in this Act shall extend, or be construed to extend, to hinder and restrain the Governor and Company of Merchants in *London*, trading into the *East-Indies*, to continue to Trade within the Limits aforesaid, untill the 29th of *December*, 1701, any Thing in this Act contained to the contrary notwithstanding.

By

By this Clause it is plain, That the old *East-India* Company were excluded from a Coast-ways Trade after the Time appointed ; for though they had a Settlement under the King's Charter, and had Effects in the *East-Indies*, yet they could not make any Advantage of the Effects after the Time limited.

And if the Act excluded them from a Coast-ways Trade, to be sure it must be designed to exclude all other Persons whatsoever.

Those that argue for the Defendant, argue from the intermediate Clauses between the 61st and 81st. And they say that every Person that subscribes 100*l.* shall have Power to sell 100*l.* in Goods, Wares, and Commodities, or Coin, within the Limits.

This is the 61st Clause ; and indeed all the rest of the Clauses go upon the Supposition, that any Person that would Trade to the *East-Indies*, would freight his Ship with Commodities, and not go out empty to carry on a Coast-way's Trade : For no Man in his Wits, that ever traded to the *East-Indies*, would carry on a Trade in such Manner ; for that would be to lose the Profits of his outward Voyage.

But certainly any subscribing Person, that had carried out 100*l.* might make the best of it by a Coast-way's Trade : For otherwise, if he had not found a Market for the Commodities at one Haven or Port, he could not carry them to another. For if the Act were interpreted, that the Subscriber was to carry the Commodities from a *Terminus a quo*, without the Limits, to a *Terminus ad quem*, within the Limits ; and that was the whole Power given to the Subscribers ; then if a Subscriber could not find a Market in one Port, he could not carry them to another ; it would be the most absurd Construction of the Act that could be.

So if a Subscriber of 100*l.* had carried out a Cargo of that Value from a Place out of the Limit, and within the Limit the Ship should meet with a Storm, and it were necessary to lighten the Ship, by throwing the Cargoe over board, no Man will say but that he may take in Goods to freight, or take up Goods on Credit, to the Value of 100*l.* that any Person might do before the Act, and the Subscribers too had the same Power and Liberty of the Act made.

And whatever Power the Subscribers had after the Act, they were, by the Act, to have and enjoy the same, exclusive of all other. For if a Subscriber might carry on a Coast-way's Trade, as they that argue for the Defendant must admit, he must by the 81st Clause, enjoy it sole and separate, and exclusive of any unsubscribing Subject.

Indeed the 61st Section, that begins to settle the Proportions, says, That Persons subscribing, shall not ship, lade, or put on Board, to or for the *East-Indies*, or other Parts within the Limits aforesaid, from *England* or any other Country or Place whatsoever, any Goods of greater Value than as in the Act is expressed ; viz. That he that has subscribed 100*l.* shall and may ship, lade, and put on Board yearly for the said *East-Indies*, or Parts within the Limits aforesaid, Goods, Wares, and Merchandizes that shall amount to the Value of 100*l.* so that though in this Clause the *Terminus ad quem* is the *East-Indies*, or a Place within the Limits, yet the *Terminus a quo* is *England*, or any
K k k Country

Country whatsoever, which comprehends all Places, either within the Limits or without.

So when the Oath is limited in the 64th Clause, they are to swear not to ship, or cause to be sent from *England*, or any other Country, to the *East-Indies*, or other Places within the Limits, any Goods of a greater Value than such as they may lawfully send.

Here the *Terminus a quo* is left at large; for the Goods may be shipped from any Country, either within the Limits or without.

So that the penning of these Clauses do comprehend a Coast-way's Trade, as well as the Trade from Places without the Limits, as to Places within; and the *Terminus a quo* is left at large, that it may comprehend all Sorts of Trade whatsoever.

Indeed the 66th Clause says, That every Person that shall send any Goods to the *East-Indies*, or other Parts within the Limits, shall enter the Quantity and Value of such Goods in a Book, and likewise the Name of the Ship and Commander.

Now 'tis argued, That no Subscriber could carry on a Coast-way's Trade, because he could not be able to make these Entries.

Indeed the Law is here adapted to the common Manner of the Trade; for no Subscriber that was fitting out a Ship, would carry her out empty to the *East-Indies*, in Order to freight her there. The Law does not suppose any Thing so absurd, as that he would lose the Profit of his outward-bound Voyage.

But there is no Doubt, that if any Person had by Storms lost the Cargo of his Ship, he might take Goods to freight, to the Value of his Subscription, within the Limits; and if he enter such Goods, *Ex post facto*, he would be within the Equity of the Law: For the Statute does not put any Cases upon particular Accidents; but the Regulation of the Proportion is adapted to the general Course of Trade; that is, to carry out Goods to the *East-Indies*, and not merely to take in Goods to freight there.

But the Regulation of Subscribers in this Manner, by these Entries, can't induce a Consequence that the Coast-way's Trade is not within the Act, since it is within the express Letter of the Law as aforesaid.

And if a Man were to Trade with Goods, to the Value of 100*l.* from a Place without the Limits, to a Place within the Limits, he must be obliged to unload at some one Place, to make his Market there, in Case the Subscriber was excluded from making the best of his 100*l.* by a Coast-way's Trade within the Limits.

From all which it is plain, that the sole Coast-way's Trade, is by this Act sold to the Subscribers, as well as the Trade to and from the *East-Indies*.

It has been likewise argued for the Defendant, that 12 *Car. Cap.* 18. concerning Navigation, is of as large Extent as the Act; and yet it did not comprehend a Coast-way's Trade. That no Goods or Commodities whatsoever, shall be imported into, or exported out of any Lands, Islands, Plantations, or Territories, but in *English*-built Ships, and whereof the Master and three fourth Parts are *English*.

This Act did not comprehend the Coast-way's Trade; for 7 & 8 *W. 3. C.* 23. was forced to be enacted, to prevent this Abuse in a Coast-

way's

way's Trade, which enacts, That no Goods shall be exported or imported into any Part or Place in the said Colonies or Plantations, but in *English* built Ships.

But the Answer is very plain ; for indeed 12 *Car.* did not comprehend a Coast-way's Trade of the Plantations ; for the Goods were carried from one Port to another, within the same Plantation, and though the Goods are imported and exported, yet they are not exported from the Plantations.

As if Goods are carried from *Portsmouth* to *London*, Coast-ways, though the Goods are exported and imported, yet they are not exported from *England*.

So the Word Plantations, in the Statute, is a general Name : And though Goods are carried there, from one Port to another, yet they are not exported from the Plantations.

But there is no arguing from the Words of one Statute, to another, unless the Words were exactly the same, because the Difference of the Words will alter the Sense and Intent of the Law.

And it is not right Reasoning to say, That because (as) the 12 *Car.* is so penn'd, as not to prohibit a Coast-way's Trade, in Foreign-built Ships, within the Plantations, that so the 9 & 10 *W.* 3. does not give a sole Coast-way's Trade to the Subscribers within the Limits, where the Language, the Penning, the Sense, and Signification of the Words, and Intent of the Statute, is perfectly different ; for no Subject, by the Act, is directly or indirectly, to visit, haunt, frequent, trade, traffick, or adventure, into or from the said *East-Indies*, or other the Parts aforementioned.

As the Words are not the same in any Particular, so there is no Similitude between them.

The Statute of *Car.* respects the Thing ; this Statute respects the Person.

It is penn'd in as strong a Language, as I think is possible to be used, to forbid all Subjects all Manner of Trading within the Limits.

There is no Ambiguity in the Words.

I don't see how they can be tortured, or represented in any Manner, to let a Subject into a Coast-way's Trade.

The sole Trade is granted to the Subscribers ; they are to execute it in the Manner they think proper.

The Subscribers, before the making of this Statute, had a Right to Trade Coast-ways.

By their Subscription, in pursuance of this Statute, they have the sole Right of Trading Coast-ways, and excluding all others ; so that which was before the general Right of all Subjects, became the Property of the Subscribers by this Act.

Whatever the Law granted to them, it excluded all other Persons from it.

And the exclusive Words are penned in the most forcible Manner, and in the most significant Language, to exclude all other Subjects from Trading within the Limits.

And it is highly probable, that this Act of the *East-India* Company being made after the 7 & 8 *W.* 3. which makes Use of these Words, That they shall not carry Goods from one Port or Place to another Port or Place

Place in the said Colony ; so in this subsequent Law, they thought it enough to say in general, that no Subject should carry Goods within the Limits, but into or from any Creek, Haven, Port, or City within the same.

Dominus Rex versus Mann and others.

Mr. *Strange's* Argument in the *Exchequer*, on Jan. 28, 1726. for the Defendants.

MY Lord, It is truly said, That this is a Matter that very much concerns the Crown, in Point of Revenue, and that your Lordships will at all Times, and upon all Occasions, take a particular Care of the Prerogative of the Crown : But I humbly hope I may be admitted to observe at the same Time, that this is a Case too, wherein the Property of all the Subjects of *England* is very highly affected ; for I am bold to say, that if the Practice which is now contended for, be allowed to prevail, no Man can be safe in transacting with another, who has any Thing to do with the Money of the Crown.

My Lord, the Case has been fairly opened by Mr. *Bootle*, as it stands upon the Record ; and as to the Objection, that we are improper to take Advantage of Anti-dating the Extent upon a Plea, as averring against the Record, which imports it to have issued on the 6th of *July*. I must own I am a little surprized to find that Matter so strongly insisted on, after what has already passed in this Cause.

It is in the Memory of every Body who attends this Court, how much we pressed to have this Writ superseded, as a Writ that had irregularly issued ; and we then offered the Distinction between an erroneous and an irregular Proceeding ; that the one may be taken Advantage of by a Writ of Error, or by Plea ; and that the other depended upon the Practice of the Court, and was proper to be redressed at my Motion ; but the Court being of Opinion, that we might have Advantage of this Matter on a Plea, we acquiesced accordingly : And having now pleaded it, in Consequence of that Opinion, it is very extraordinary now to see how the Argument is turned upon us. On the other Side, when we moved on the Irregularity, we were told by them, It was a Matter we might have Advantage of by Plea ; and now we have pleaded it, they object against it for that very Reason.

My Lord, in *Lut.* 332. 1 *Leo.* 173. 1 *Sid.* 273. there are Instances of these Averments, that Writs did not Issue till a Day subsequent to the Teste. I can't say the Judgment of the Court is either Way upon these Cases ; but since in this Case, the Court have already given their Opinion, that this was a Matter pleadable, I don't think myself any otherways concerned to Answer this Objection.

If I rightly apprehend, the Design of the Court, in refusing to relieve us on a Motion, was in Order for a more solemn Determination of a Point of this prodigious Consequence ; and since this was a Method not invented by us, but prescribed by the Court, in Order to bring that Point upon the Stage, I little expected to hear a Matter of Form insisted on, when I apprehended we should be confined to the Merits of the Question ; and as it was brought before the Court upon Record, with

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that only View we must rely upon the Justice of the Court, that we shall suffer no Prejudice by the putting this Question into the one or the other Method of Determination.

Taking it too for granted, that we are properly before the Court on this Plea, I shall beg Leave to offer, That Mr. Attorney having demurred to the Plea, he has thereby admitted all the Facts contained in our Plea, viz. that in Reality, the Extent did not Issue till the 5th of October; before which there had been a regular Commission of Bankruptcy and Assignment. And that this is a Bar to the Extent, appears from *Capel's Case*, 2 *Show.* 480. where a prior Commission of Bankruptcy and Assignment, was held a good Plea to the Extent.

So 2 *Ro. Ab.* 158. G. 2. where a Subject extended Lands and Goods, and after Seizure, but before a Liberate, there came a Prerogative Writ, and which had Place, because there was not an actual Liberate: But in that Case it is not pretended it would have avoided the Subject's Extent, in Case there had been a compleat Execution, as in *Dy.* 61.

That these Writs issued, tested in the Vacation, is a Fact Nobody will deny. Your Lordships Records afford us a thousand Instances of that Nature, and none of them bare Teste before the Fiat, except in one only Instance, which I shall account for by and by. That in *Capel's Case* was Teste, the 24th of December, which must necessarily be out of Term.

But then it is objected, That the Subject's Execution bears Teste the last Day of the preceeding Term, and that at Common Law, the Goods were bound from that Time; and why then, say they, should the Crown be in a worse Condition than the Subject; especially since it must be admitted, that the Crown is not bound by the Statute of Frauds and Perjuries.

To this I answer, That there is a very material Difference between the Case of the Crown, and that of the Subject. The Subject, it is true, has his Writ Teste, the last Day of the preceeding Term, because he has run through the whole Course of a judicial Proceeding; and his Cause was ripe for Execution at that Time, and he can have no Process Teste out of the Term; whereas the King, by his Prerogative, may have Execution awarded out of Term, and that in the first Instance; and if he has an immediate Execution upon that Award, he is not in a worse Condition than the Subject; nay, he is in a much better; for the Subject must stay till the next Term, if his Cause was not ripe for Execution.

And this differs it from the Case of a *Certiorari*, made out in Vacation Teste, the last Day of the preceeding Term. When there is a Necessity to Teste it in Term Time, it not being a Prerogative Writ; and besides it is of no Consequence, in the Case of a *Certiorari*, which removes all Orders, though after the Teste, so as they be before the Return.

And I take the true Reason why this is not provided against by the Statute of Frauds, is, that it was not a Practice so much as thought of at that Time. It was certainly a Case within equal Mischief; no Doubt but there have been many Occasions to antedate Extents before
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this;

this ; and the never doing it till now, is, according to *Littleton*, a strong Argument against the Legality of doing it at all. *Capel's Case* cited before, was 2 *Jac.* 2. and even then there was no Thought that it might have been tested backwards, so as to overreach the Assignment ; though every Body knows Matters of Prerogative went very high at that Time. And as this is a Novelty in Law and Practice, I beg Leave, in the next Place, to consider a little what will be the Consequence of it.

The Goods will, without Question, in the Case of the Crown, be bound from the Award of the Execution, according to Sir *Gerrard Fleetwood's Case*, 8 *Co.* 171. Now the Award of Execution is in Point of Time the Teste of the Writ ; so that all Transactions by the Bankrupt, all Sales, *bona fide*, for a valuable Consideration, and all Payments by them made in the Way of Trade, between the 6th of *July* and the 3d of *December*, will be avoided, which will introduce great Confusion.

By Law, the King's Execution relates as to Land, to the Time of becoming in Debt to the King, and as to Goods from the Award of Execution ; but by this Means it must, as to Goods, be made to relate to a Time precedent, even to the being in Debt ; for a Debt may be contracted in the Vacation : So that the Execution, according to this new Practice, shall Issue before any Debt, whereas the Process is to be awarded for the Debt, and must recite the Bond entered into the Crown. In this Case indeed it was four Days old at the Teste of the Writ : But what an Absurdity will it be, if it should happen to bear Date after the Term, which may be the Case. It has been thought a little hard to make it relate as to Lands, to the being in Debt, which Debt could not appear to a Purchaser ; but it will be much harder, if it be suffered to relate to a Time before the being in Debt.

My Lord, the Practice of every Court is the Law of that Court ; and it has been so strictly adhered to, that in the Case of *Bewdly*, a Practice of seven Years only was allowed to prevail against the express Words of an Act of Parliament.

I would too consider this Writ in the next Place, upon the Practice ; and the 33 *H. 8. C. 39. S. 35.* that Act says, That the King's Process shall be preferred, and he first shall have Execution, so always that the King's said Suit be taken and commenced, or Process awarded for the said Debt, at the Suit of the King, before Judgment given for the said other Person.

Upon this Act, I take it, the Suit must be said to be then taken and commenced, when the first Step is made towards the Proceeding to Execution ; now the first Step to be taken, is to procure the Fiat of a Baron, and then it is in Fact, that the Process is awarded, so upon the Foot of the Act of Parliament, this was not a Suit taken or commenced, or a Process awarded 'till the Assignment of the Defendant had taken Place ; the Court will, I apprehend, take Notice of its own Practice ; and therefore, since it appears upon the Record, that there was no Fiat 'till the 5th of *October*, the Court will take Notice, that such a Writ as this could not issue according to the Course of the Court ; and then, whether we can be admitted to say, that in Fact it issued at a Day subse-

subsequent to the Teste, will not be material, since it appears to the Court to be so, without our Averment.

My Lord, I did mention before, that there had been one Instance of antidating an Extent, and that it was the Case of the Attorney General, and quashed in 1713, there the Fiat was the 24th of *February*, and the Writ taken out upon it, was Teste the last Day of the preceeding Term, which was the 12th of *February*, and after great Consideration, and Search of Precedents, that Writ was set aside on Account of the Novelty, and Consequences of such a Practice.

So that as to Precedents, your Lordship will consider how the Case stands, with Regard to them; here is a new Sort of Writ taken out, and the only Instance of such a Writ is, an Instance wherein it was set aside; they who would introduce this Practice, are to justify it by Precedents, and we say there are none on that Side, but that every Extent which bears Teste in Vacation, is a strong Precedent in our Favour, since it might have been tested in the precedent Term; it is impossible to think so great an Advantage would not be taken by such learned and eminent Men, as are employed for the Crown.

If this be a Prerogative, it is like all others to be proved by Usage; and that there is no Pretence of Usage to support it, is clear. If the Crown has engaged by *Magna Charta* not to run upon the Subject, *nisi per legem terræ*, let them shew us the *Lex terræ*, by which this extraordinary Proceeding is to be warranted.

My Lord, there having been so great an Alteration in this Court, since the Time of the Motion, it may not be improper to mention what seemed to be the Opinion of the Court, as to the Merits of this Question. The Lord Chief Barons *Bury* and *Montague*, were both of Opinion, the Writ was illegal, and would have suspended it; *Price* and *Page* indeed were for having it pleaded, but I did not observe, that the Opinion of either of them was, that the Writ was Right.

My Lord, I humbly apprehend your Lordship will consider this Extent, on the Foot it stood on the 6th of *July*, when the Bond was but four Days old; and if at that Time there was no Ground for this Proceeding, surely it is not to be supported by Matter, *ex post facto*, by a meer Relation or Fiction of Law, without Precedent to divest a Right, which has been once legally vested.

For this Purpose, I beg Leave to mention a Case that was in *B. R. Trin. 4. George I. Waring* and *Dewberry*; there a Landlord who had Rent due to him, died Intestate; after which, the Plaintiff in Action, sued out Execution against the Defendant, who was Tenant, and levied the Debt upon him; after this, Administration was committed to *J. S.* who thereupon came into the Court, and moved for a Rule on the Sheriff to pay him a Year's Rent out of the levy'd Moneys, pursuant to the 8 *Ann. C. 17.* urging, that though he was no Administrator at the Time of serving the Execution, yet as soon as the Administration was committed, it had Relation to the Death of the Intestate, and he might bring Trover for Goods taken between the Death of the Intestate, and Commission of the Administration; but the Court held, that Relations, which are but Fictions of Law, should never divest any Right legally vested

vested in another, between the Death of the Intestate, and the Commission of Administration; and the Plaintiff in the Action having duly served his Execution, before the Administrator had a Right to demand his Rent, it was not reasonable the Plaintiff should be defeated by any Relation whatsoever; they did not in that Case, deny the Authorities which give the Administrator *Trover* by Relation, but went on a Distinction, that will govern this Case between Relations that are to defeat lawful Acts, and such as are to punish those that are unlawful.

An Objection was taken, that we should not have *Oyer* of the first Writ; but if your Lordship pleases to cast your Eye upon the Writ itself, you will find it is indorsed upon it, and made Part of the Record in the Case; it is marked at the Bottom of the Writ, but they were so sensible of the Absurdity of the Fiat in *October* for a Writ that issued in *July*, that in this particular Instance, they have deviated from the common Form, and have modestly indorsed it upon the Back of the Writ.

The Traverse is objected to, that it is to put the Matter of Law in Issue, but surely that is no new Thing; where Matter of Fact, and Matter of Law are intermixed, it was necessary to put the Matter of Bankruptcy, and the Assignment in Issue, and as we plead to the Inquisition, we must traverse that which is the Point of it.

Upon the whole too, it is certain that his Majesty has many great and valuable Privileges and Prerogatives, and may he live long to enjoy them in their full Extent; our own Experience of the Happiness of his Government may assure us, that he himself designs only to make the Law of the Land the Measure of his Actions, and it is a Pleasure to observe, that this single Attempt to stretch his Prerogative beyond its Bounds, proceeds only from a private Dispute between two Co-Obligors in the same Bond to the Crown, and wherein 'twas necessary to make Use of his Majesty's Name, though he is not concerned in Interest. It is one Article of the Bill of Rights, that the late King *James* had under Pretence of Prerogative, levied Money on his Subjects in other Manner than was warranted by the Laws of the Land; and yet it does not appear, that the Practice now set up was attempted even in that Reign; and I am sure that we now live in Times so much happier than those, that it will be sufficient to confute this Doctrine, if we only shew, as I have already done, that this is an *unprecedented Attempt, to stretch the Prerogative of the Crown to the Subversion of the Liberties and Properties of the Subject.*

Bridges *cont.* Mitchell.

Where 20
Years Ac-
quiescence,
bars Ac-
counts be-
tween Mer-
chants.

A Bill was for an Account by Plaintiff, a Merchant, against the Defendant another Merchant, who was his Partner. The Defendant pleads, that the Dealings, concerning which the Plaintiff prays an Account, were transacted above 20 Years before the Bill brought, and pleads such Acquiescence without Suit; and also the Statute of Limitations 21 *Jac.* 1. C. 16. in Bar of the Account.

Per Cur' Forbearance of Suit for 20 Years, will in Equity be a good Bar, though in a Demand by one Merchant upon another.

Secondly, It is not necessary in the Answer, for the Defendant to aver his having not promised within six Years to Account, &c. unless such Promise is particularly charged in the Bill, as was resolved *inter Bodvil*, and the Bishop of *Meath* in this Court; and further, that though the Statute has been always construed, to except Accounts open between Merchant and Merchant, yet that is to be understood with this Distinction, that if open Accounts be by subsequent Acts continued, they are not barred by the Intervention of such length of Time, from the original Transaction; but if such an Account is by the Complainant deserted, then, in such Case it is barred,

And held the Defendants Plea good.

Hanson and Fielding:

St. Barb. 214.

A Bill was brought by an Impropiator, claiming under a Grant from the Crown, after the Dissolution of the Religious Houses, for the Tythes of Corn, Grain, Wool and Lamb, for the Year 1723. Defendants, As to the Tythe for Wool and Lamb, say they, are Lessees of the Vicar of *Austis*, and that the small Tythes did not belong to the Mother Church, but were received by the Chaplain of *Austis*, long before the Dissolution of Religious Houses, and that after they came into the Hands of the Crown, they were also enjoyed distinctly; as to the Tythes of Corn and Grain, they say, that the Lands were formerly Part of the Possessions of the Hospitallers of *St. John of Jerusalem*, and that their Lands were discharged from the Payment of Tythes, while they continued in their own Manurance and Occupation; that their Lands, by Virtue of some Acts of Parliaments, (27 31 32 *Hen. VIII*) were vested in the Crown, and were to be held and enjoyed by the King, and his Grantees, in as large and ample Manner, as the late Religious Houses held them; that they were Grantees under the Crown, and consequently entitled to hold them discharged from Tythes.

Of Exemptions from Tythes.

Mr. *Bunbury* for the Defendant objected, that the Lands of the Hospitallers of *St. John of Jerusalem*, coming to the Crown by the Statute 32 *Hen. 8. c. 24.* they could not claim the Privilege of the Clause of Exemption, in Statute 31 *Hen. 8. c. 13.* by which it is appointed, that all Monasteries, Abbies, &c. which before had come, or hereafter should come to the King, by Suppression, Surrender, &c. should be held and enjoyed by him, in as large and ample Manner, as the religious Houses held them; and whereas many of them were discharged from Tythes, they should be held by the King, and his Grantees discharged, &c. and cited 2 *Co. 47.* Bishop of *Canterbury's* Case, where it was resolved, that the Clause of Discharge should extend only to those Possessions, which come to the King by the said Act, and that it would be absur'd, that the Branch of the Act 31 *Hen. 8.* should extend to a future Act of Parliament, which the Makers of the said Statute

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31 *Hen.*

31 *Hen. 8.* without the Spirit of Prophecy, could not have fore-Knowledge of, and insisted strongly upon the Case of *Cornwallis* and *Spurling*, *Cro. Jac. 57. Moor 913.* as an exprefs Authority in Point.

Serjeant *Pengelly* for the Defendant made Use of two Ways, to take off the Objection. *First*, That Part of the Land of the Hospitallers of *St. John of Jerusalem* were vested in the Crown by the 31 *Hen. 8.* and that the 32 *Hen. 8.* was only made, because of the great Compass of their Estates, (some of which were in *Ireland*) and to be so general, as to comprehend all that might be omitted in 31 *Hen. 8.* and then without Doubt, the Branch of the Act, concerning Discharge from Tythes, extends to them; But if the Court should think these Lands passed only by the 32d, he thought *Secondly*, that *even upon that Statute, the Grantee should hold them discharged from Tythes*; and seeing it had been resolved by some Judges, that the Clause of Exemption in the 31 *Hen. 8.* should not extend to latter Statutes, (though at first that was a Doubt upon the Words *or hereafter shall come*) he would therefore wave that, and rely upon the 32 *Hen. 8.* by which they are vested in the Crown with all Privileges, &c. now one of their Privileges was, that they should hold the Lands discharged from Tythes, whilst they continued in their Occupation, which being continued to the Crown by the said Statute 32 *Hen. 8.* we say is a Real Discharge annexed to the Land, and going along with it; and it has been accordingly expressly granted to us, for we have a Grant dated the 15th of *December, 4 Edward 6.* of this Manor of *Barnacle*, &c. with the very same Words as are in the Statute, *viz. with all Privileges, &c.* and we have enjoy'd it ever since, with the Benefit of this Exemption; and cited *Raym. 225. Fosset and Franklin*, where 'tis said *per Hale C. J.* that by Reason of the Word *Privileges*, they shall not pay Tythes, and resolved accordingly by the Court.

Serjeant *Cummins*, senior, and Mr. *Ward*, senior, on the same Side, cited *Dy. 277. Pl. 60. W. Jon. 182. Bridg. 32. Lat. 89.* and *per Ward* in *Trin. Term. 1687*, the Case of *Daniel* Vicar of *Bengeo* in *Hertfordshire*, and Sir *John Gower*, where upon considering all the Cases, this Court held all the Lands discharged, and dismissed the Bill.

Mr. *Bunbury* said in Reply, that in the Case in *Dyer*, the Lands came to the Crown by 31 *Hen. 8.* and then they were immediately exempt, as *Bridg. 32. Lat. 89. W. Jon. 182.* As the Case appears, the Court was equally divided upon the Point of Discharge, as to *Raym. 225.* it was a very short Report, and does not appear upon what Reasons the Court went. The great Stress is laid upon the Word *Privileges*, in the Statute 32 *Hen. 8.* and yet that very Word is used in Statute 31 *Hen. 8.* and if that of itself had been sufficient, for what Reason did they insert a particular Clause of Exemption from Tythes? he insisted upon the Case of *Cornwallis* and *Spurling*, which being determined upon a special Verdict, the Book also taking Notice, that the like Judgment was given upon a Demurrer is of great Authority.

Gilbert, Chief Baron. Them Privileges were granted to these Ecclesiastical Corporations by Bulls from the Pope, but these Discharges, for want of a special Clause to continue them, were extinguished in as many of them, as were dissolved by the 27 *Hen. 8.* but that cramping the

the King in his Alienations in 31 *Hen.* 8. they put a Clause to continue to the Crown the Privileges that were in them as special Corporations; now the Question is, whether the Word *Privileges* in 32 *Hen.* 8. has not the same Intent to carry all the other Privileges to the Crown? if the Point had been resolved, we should not have disputed it.

Nota, It was no further settled, for when the Plaintiff went into his Proof of the Grants of the Tythes of these Lands, they appeared to be Grants of different Possessions, therefore his Bill was dismissed.

Allport versus Thomas.

A Person that had furnished necessary Tackling for a Ship, that was afterwards sold, by his Bill prays a Discovery of the Personal Estate of one of the Part Owners; who was dead, and to have Relief against his Executor, and the surviving Part Owners.

On a Marine Contract, Relief pray'd against Executors.

Mr. *Ward*, senior, for the Plaintiff said, that by the Civil Law, the Bottom of the Ship was liable to answer for the Tackle and Furniture, which the Defendants had contracted for; and here they having sold the Ship, they were very proper to demand Satisfaction out of the Profits arising by such Sale, and as their Bill was proper to have a Discovery of the Personal Estate of the Part Owner that was dead, so from thence they would be entitled to Relief against the others; for in the Case of *Dupins* versus Duke of *Kingston*, which was a Bill brought by a Milliner against the Duke, as Administrator of his Son, for a Discovery of Assets, and to have a Debt which was due to her from his Son discharged, it was laid down as a Rule, that Discovery should draw with it Relief.

Mr. *Bumby*, for the Defendant said, that if that was to be taken as a general Rule, the Common Law would be of little Use, for then always after the Death of one of the Parties, they might bring their Bill here upon any Contract; besides, here they should have proceeded in the Court of Admiralty, to have subjected the Bottom of this Ship; and that this Court could not do it.

Chief Baron *Gilbert* said, that the Chief Distinction upon the Rule that *Discovery should draw with it Relief*, seemed to be, that where a Discovery is prayed, and a liquidated Debt admitted by the Answer, the Court might then proceed to give Relief; but where the Debt was unliquidated being uncertain, and sounding in Damages, it was proper for a Jury to ascertain it, there being nothing for a Court of Equity to found a Determination on; that though this Case was within the Merchantile Law, yet it being admitted by the Answer, that the Charge was for Tackling, &c. a Court of Equity must grant them the Redress as a Court of Admiralty would, *viz.* upon the Bottom of the Ship, and that it would be very hard to send them back again there to obtain Relief; and that all the Part Owners ought to make Satisfaction, having received the Profits of the Voyage, which the Ship was enabled to perform, by the Plaintiff's furnishing the Tackle, &c.

Baron *Hale* thought the Case of the Duke of *Kingston*, should have gone no further than a Discovery, and after that, should have proceeded

ceeded at Law; that in this Case, the Proceeding in this Court was very proper, and they might go on; for in the Court of Admiralty, Seamen's Wages are recoverable, and they are likewise chargeable, properly upon the Bottom of the Ship, and yet the Court of Chancery retains Bills for them, and Sir *John Trevor*, late Master of the Rolls, used to say, that a Court of Equity had a concurrent Jurisdiction with them.

Quilter versus Mussendine.

Non-Residence pleaded in Bar, to a Bill for Tythes.

A Bill was for a Discovery of Tythes by Lessee of a Parson. The Defendant pleads 13 *Eliz. C. 20.* against Non-Residence in Bar.

Ward for the Plaintiff, objected to the Plea.

First, That it was bad in Substance, for that it did not shew that he was not of Necessity, or justifiably absent, (barely saying he was voluntarily absent, not being sufficient) as he might have done, according to *Butler and Godall's Case*, 6 Co. 21 b.

Secondly, The Time of Absence, the Statute requires to avoid the Lease, is 80 Days and more, which ought to appear to be a continual Absence for 80 Days altogether, and at one Time, 1 *Bulstrode* 111, *Shepherd versus Townslee*, Mod. 436.

Thirdly, Though the Plea should be thought good in Substance, yet it could be no Bar to the Discovery, though it might, as to the Relief, to prove which, he mentioned the Case of a *Modus* pleaded in Bar, to a Bill for Tythes, in which Case it was held, that although the Plea was good, as to the Relief, yet it was no Bar as to the Discovery; but that the Defendant must answer, and shew the Quantity, Quality and Value of the Tythes, and the Reason upon which that has been so resolved is, because if the Defendant's Plea in Bar should prove to be false, the Plaintiff then is to have a Discovery from the Defendant upon Oath, and they won't let him run the Hazard of losing such Discovery, which he might do, if the Defendant should die in the mean Time; and that in *Hillary Term* last, the Court would not allow a Plea of the Statute of Limitations, to be a good Bar, to a Bill for Tythes.

Fourthly, *Edlin* objected, that they had set out the Year wrong in the Plea, and that it did not appear that he was absent for above 80 Days in any on Year, taking the Year to commence according to the Computation of the *Era*, upon the 25th of *March*, as he insisted it ought.

Bumby and *Boote* for the Defendant, to what had been said, gave the following Answers.

As to the first Objection, that if he had any good Excuse for his Absence, it being a Thing lying entirely within his own Cognizance, they need not take Notice of it, but he must shew it in his Replication.

And the whole Court held the same.

Secondly, The Construction they contend for, would entirely defeat the Statute, for at that Rate, he need only be there five Days in the whole Year; as to the Opinion in *Bulstrode*, 'tis only that of two Judges *Obiter*; and as to *Moor* 436. the *insimul ac pariter* are in the special Verdict, but no Notice taken of it, that it was necessary they should be in.

Thirdly, They distinguished this from a Plea of a *Modus*, for that admits the Plaintiff's Title to the Tythes, but only avoids the Payment of them in Kind; for that by Custom he was to have something else in lieu of them; in that Case, the Demand is allowed to be just, and the only Question is, in what Manner that Demand is to be satisfied; but the Plea in the present Case, denies and defeats all the Plaintiff's Right and Title to the Tythes, and to any Manner of Satisfaction for them. The Plea of the Statute of Limitations was also very different from this, for that Statute could not be extended to a Demand for Tythes.

Fourthly, That the Year was to be 365 Days, without reckoning it from the 25th of *March*, and they insisted upon the Case of *Etheridge and Mills* in this Court, being in Point.

Gilbert, Chief Baron. The Case of *Etheridge and Mills* can't be distinguished from this.

Secondly, The Case in *Bulstrode* is not Law, for that would defeat the Statute *causa qua supra*.

Thirdly, That this was a good Plea in Bar, both as to the Discovery and Relief; as to the Case of pleading a *Modus*, that allows the Plaintiff's Title, and so that is pleading against what you allowed before.

The Reason why the Statute of Limitations was not allowed to be pleaded in bar to a Bill for Tythes was, that Tythes were not of the Nature of those Demands that are intended to be barred by the Statute; besides, that Plea allows the Title; Years shall not refer to the *Era*, but must be intended a Solar Year 365 Days.

Price Baron agreed the Year shall be 365 Days, and the Absence any 80 Days within that Compass.

As to the second Objection, how inconvenient it might be to allow such Plea a good Bar, as to the Discovery; for that supposing the Plea to be false, if the Defendant should die, the Plaintiff might lose the Benefit of a Discovery, the Answer was very plain; for the Defendant having here shewn that the Plaintiff has no Title to the Tythes themselves, he in Consequence can have no Title to a Discovery concerning them.

Page Baron The Plea of a *Modus* is an Acknowledgment of the Title of the Plaintiff, and is in Part a Discovery itself, for it sets out, he is to pay so much for Corn, so much for Pigs, &c. and then it is nothing strange he should be compelled to go on a little further, and shew the Quantity and Number of his Corn, Pigs, &c.

He took the Distinction to be between a Plea, acknowledging the Title, and one which absolutely denies it; if a Bill be brought by an Heir, claiming by Descent against another, suggesting some Fraud, and praying a Discovery, there if Defendant pleads he is a Purchaser for valuable Consideration, such Plea which goes to the Plaintiff's Title, is always good, both as to the Relief and Discovery; so in Case of a Bill for an Account against one as Bailiff suggesting Fraud, If the Defendant pleads, that at such a Time he did Account, he need not go on, and

set out an Account ; and he also agreed as to the Computation of the Year.

Hale Baron That the Plea is a good Bar to the Discovery, and that the Case of a *Modus*, had been rightly distinguished from this.

As to the Statute of Limitations, he thought it might have been pleaded in Bar to the Discovery, if it could have been pleaded at all, which it could not ; for that Specialities are not barred by the Statute, and Tythes are of a higher Nature.

And he further said, that *no Construction could be too liberal to make Parsons reside, and take Care of their Parishes.*

Cuthbert *versus* Westwood & al.

What Payments in lieu of Tythes are good, &c.

No Tythes originally due of Forest Lands.

BILL against Land-Owners to establish a Right of 40 *l. per Ann.* and in lieu of Tythes, which by a Decree in the Time of *Car. I.* was to be paid out of particular Lands, (which were formerly Part of the Forest of *Braden*) to the Vicar of *Churchblade* in *Wiltshire*.

Two Objections were taken for want of Parties. *First*, That these Land-Owners were Tenants to the Crown, of Lands lying within the Bounds of the Forest, (which formerly paid no Tythes) and that so the Attorney-General ought to have been made a Party.

Resp. It does not appear by the Bill, that they are Lessees under the Crown, and the Defendants have not insisted upon it in their Answers, and so that is out of the Case.

2d Objection. It is not sufficient to make the Land-Owners only, but they should have made the *Occupiers* Parties to the Bill ; for a Decree against the Land-Owners could not affect them.

Resp. per Bunbury. That it would be endless to make all the *Occupiers* Parties ; and if that was necessary to be done, the Plaintiff could never come at his Right, for there were great Numbers of them, and any single one dying, would put the Plaintiff to his Bill of Revivor, and cited the Case of *Biscoe*, against the Undertakers of the Land-Bank, before Lord Keeper *Wright*, who said, he would not oblige them to bring all before the Court, since the Right might be determined, by having a View, which *Cur'* thought reasonable.

Per Cur'. Though we can decree only against the Land-Owners, who are before the Court, yet that will affect the Lands ; the 40 *l. per Ann.* ought to be apportioned among the Owners, and the original Decree may be carried against the *Occupiers*. And

Decreed a Commission should go to enquire into, and ascertain the Value of the Lands, the Owners and *Occupiers* Names, and what Proportion of the 40 *l. per Ann.* each Tenement ought to pay.

Coleman Impropiator of Thompson in Norfolk, Plaintiff,
versus Barker, Defendant.

THE Plaintiff by his Bill, demanded Tythe for the depasturing of Sheep on Turnips, remaining on the Ground unsevered. Tythes for depasturing of Sheep on Turnips, &c.
The Defendant said, the Sheep paid Tythe of Wool, and that Tythes ought not to be paid twice.

It appeared, that after Sheering Time, the Defendant fed his Sheep with Turnips, whereby they were bettered 5 s. per Sheep, that they went about 5 Months on the Turnips, and then were sold for the Butcher, and the Defendant brought in a like Quantity of new Sheep, before Sheering Time came again; so that the Plaintiff always had Tythe Wool, of the full Number.

Pengelly, for the Plaintiff, said, this Improvement of the Sheep by the Turnips, was a new Increase, and that consequently Tythe ought to be paid for the Improvement and Increase, and if the Turnips had been severed, there had been no Doubt, but Tythes had been due; he cited three Cases which he rely'd on.

First, The Case of *Nicholas and Hooper*, 1 Ro. Ab. Tit. dismes 642. Pl. 7. where it is adjudged, that if a Man pays Tythes of Lambs, and two Months after, Sheers the other nine Parts, he shall pay Tythe Wool, although he had before paid Tythe of the Lambs; for says the Book, it is a new Increase.

Secondly, The second Case which he quoted, was *Showers* Parliament Cases, 192. *Eastmond* versus *Sandys*, a Demand for Tythe Herbage of Oxen, which were depastured to be fatted.

The Defendant insisted, that these Oxen had been used for the Plow, and so were exempted; that their Labour improved the Parson's Tythe, and so to pay Tythe for their Agistment, would be double Tything; but the Court of Exchequer decreed, and it was affirmed in the House of Lords, that Tythe Herbage was due from the Time they were taken from the Plow, they being then no otherwise beneficial to the Parson in Tythes.

Thirdly, The Case most rely'd on, was a Decree in this Court, *Hill* 1 W. & M. *Dummer* and *Wingfield*, which was a Demand of Tythe for Pasturage of Sheep, from the Time of Sheering, till they were fold; the Defendants insisted, that by the Sheeps depasturing on the Land, it was improved, and the Plaintiff's Tythes bettered thereby; but the Court decreed an Account, and said, that was no Bar to the Plaintiff's Demand; and this Decree, upon a Rehearing, was affirmed.

Ward and *Bunbury*, for the Defendant, argued, that if this Demand prevailed, it would be double Tything, which was contrary to the whole Tenor of the Law; and cited many Cases for that Purpose. But,

232 *Term. Pascha*, 12 GEORGE I. in *Exchequer*.

Curia agreed, that it was a new Increase, that they could not distinguish it from the Case of *Dummer* and *Wingfield*, that the Distinctions laid down in the Case of *Eastmond* and *Sandy's*, *Shower's* Parliament Cases 192. were good; and decreed, that the Defendant should go to an Account.

The End of the Exchequer Cases in England.

R E P O R T S,

Of Cases Heard and Decreed in the Exchequer in *Ireland*.

Tempore GEORGE II Iⁿⁱ.

James Barnwell and Edward Dowdal, *Executors of Thomas Dillon, Plaintiffs.* James Russell, Patrick Russell, George Aylmer, Walter Hussey, Daniel Wybrant, Robert James, Elizabeth, Mary and Eleanor Russell, *Minors, per Terence Geohegan, their Guardian, Peter Day and Edward Hussey, Defendants.*

*M*atthew Russell being seized in Fee of *Brownstone, &c.* by Indenture, dated the 5th of *March, 1691*, between the said *Matthew and Clare* his Wife, of the first Part, the Defendants *George Aylmer and James Russel* of the second Part, and *Elizabeth Russell, and Bridget Russell* his Daughters of the third Part, did grant the Premises to *James and George Russell*, for 99 Years, in Trust (*inter alia*) to raise out of the Profits 500 *l.* to the Use of such Daughter as should marry with one of his Name, and in Trust to raise 50 *l. per Ann.* for the other Daughter, during her Life.

Bridget intermarried with *Patrick Russell*, and had Issue *Robert, James, Elizabeth, Mary and Eleanor Russell*, the Minors; and *Elizabeth Russell*, the other Daughter of *Matthew*, intermarried with *Thomas Dillon*.

Matthew Russell, the Grandfather to the Infants, died; *Patrick Russell* entered, and took the Profits of the Premises, and the Annuity of 50 *l.* was in Arrear; and *B.* and *Thomas Dillon*, and *Elizabeth* his Wife, preferred their Bill in this Court against the now Defendants.

That pending the Bill; *Elizabeth* died. *Thomas Dillon* took out Administration to her, and revives the Proceedings, and obtains a Decree for the Annuity and Arrears, and then dies.

The now Plaintiffs, Executors of *Dillon*, sue a *Subpœna sci' fac'* to have the Decree executed.

The Defendants, by *English* Plea plead, that an Executor of an Administrator, can't revive a Decree, obtained by an Administrator, but it ought to be brought by the Administrator *de bonis non* of the Intestate; that *Peter Russell* is the Administrator *de bonis non*, that *Dillon* did not administer the Money, recovered by the Decree; that *Peter Russell* by Deed, the 24th of *April*, 1714, for a valuable Consideration, released the said Decree; and further, that the *Subpœna* is not sufficient, because that the said *Peter Russell* is not made a Party.

I take this to be wrong in Matter of Form, because to the Latin Process of this Court, there can be no such Thing as an *English* Plea, as *Wan* and *Lake's* Case, is full in Point, 1 *Chan. Rep.* 50. and is reported by Sir *Anthony Keck* as follows:

Wan versus Lake.

THE Demurrer was to a *Subpœna* in Nature of a *sci' fa'* and it was, that he that brought *Subpœna* the did not thereby allege himself Heir or Executor to him who had the Decree.

Resolved there was never any Demurrer of this Nature before, and the *Subpœna* was no Record, nor any where filed, and so not to be demurred to; but that Cause was to be shewn upon the Return of the Writ, upon the Order, and the Order did mention him that brought the Writ, to be Heir and Executor, so this Demurrer was conceived very ridiculous, and over-ruled.

It was attempted in the Exchequer, but deny'd the *Subpœna*, the old Prerogative Process, to bring any one into Court; and it appears to have been appointed first in the Reign of *Richard* the 1st, by *John Waltham*, Bishop of *Salisbury*, *Rolls. Chan.* 371. D. N^o. 2.

Therefore there is no Plea to that Process, but the Plea must be some *English* Allegation to the Court. And in this Case, they ought to have shewn by Motion, that the Person who sued the *Subpœna* was not entitled to the Decree.

Secondly, The Plea is not good in Substance, because the Husband is entitled to the Arrears due to the Wife out of this Estate, *jure proprio*, and not merely as Administrator, or Representative to the Wife, and therefore the Benefit of the Decree belongs to the Representative of the Husband, and not to the Administrator *de bonis non* of the Wife, for whether it is taken as a Chattle Interest, or a Charge on the Estate, it belongs to the Husband; for if the Wife be possessed of a Term for Years and dies, the Husband shall have it by Survivorship, and not the Executor or Administrator of the Wife; for 'tis vested in the Husband in the Right of his Wife, and therefore it can't be divested by the Death of the Wife.

Indeed, if the Wife had been dispossessed before Marriage, and no Recovery, during the Coverture, the Representative of the Wife should have the Term, and not the Husband, because it is there a Chose in Action, and goes according to the Contract, to the Representative of the Wife, *Cl.* 351.

Now

Now this must be looked upon as a Term in Possession, because the Trustees either were in Possession, or the Husband of *Bridget* as *Cestui que* Trust, as Tenant at Will to them.

The Possession of a Trustee, is the Possession of *Cestui que* Trust.

And the Possession of one *Cestui que* Trust is the Possession of all, as the Possession of one Tenant in Common is the Possession of the rest.

It is ruled, That the Trust of a Term shall go in the same Manner as the legal Interest would have gone. This is laid down as the Foundation of the Argument in the Case of Perpetuities, by Chancellor *Nottingham*, Fol. 48. 3 Chan. Cases and in which there was no Difference of Opinion between the Judges, because there can't be one Rule of Property in the Court of Chancery, and another in the Courts of Law. So that if this Trust of a Term is to go as the legal Interest of the Term would have gone, it must survive to the Husband.

3dly, If this Trust to make an annual Payment, be looked upon as a Charge upon the Estate, it belongs to the Husband. Here the Distinction is, that if the Wife be seized of a Rent-charge, during Life, the Husband (at Common Law) had the Arrears incurr'd, during the Coverture; but he had not the Arrears fallen due before Marriage, till the 32 H. 8. Cap. 57. but by that Statute, he has the Arrears incurr'd as well before as after. Cl. 351. b.

This Statute takes Place in *Ireland*, 10 Car. 1. Sess. 2. Cap. 5. and therefore such Arrears at Law, belong to the Husband's Executors or Administrators.

Therefore his taking out Letters of Administration to his Wife, and suing as such, is only surplussage, and does not hurt his Title; and therefore the Benefit of this Decree belongs to his Executors, and they are entitled to the *Subpoena*, and the Plea, &c. ought to be over ruled.

Constantine Magennis Lessee of Richard Close, versus William and James Mac-Cullogh.

RICHARD CLOSE being Tenant for Life, with Remainder to his first and other Sons in Tail, with several Remainders over to the Brothers of *Richard*, the Reversion to *Richard* in Fee (prout the Will.) *Richard* makes a Lease for Years by Indenture, to *William Mac-Cullogh*, and afterwards has the Lease delivered up to him by *William Mac-Cullogh*; and then *Richard* tears off the Seal by the Consent of *William*; *William* continues in Possession after the Lease was cancelled as aforesaid; and some Time after, *Richard* makes a Lease to *William*, being in Possession, of the same Lands for three Lives, with Livery and Seisin; after Livery and Seisin, *Richard* marries and has a Son *Richard*, the Lessor of the Plaintiff.

Question 1. Whether the Lease for Years be surrendered by the cancelling the Indenture as aforesaid?

Que-

Question 2. Whether the contingent Remainders to the first and other Sons of *Richard* the Father, be destroyed by the Lease for Lives, made as aforesaid by *Richard* the Father.

The above Case, and Points thereon, are referred to the Right Honourable the Lord Chief Baron Gilbert, for his Judgment, at his Chamber.

I AM of Opinion, that since the Statute of Frauds and Perjuries, a Lease for Years cannot be surrendered by cancelling of the Indenture without Writing; because the Intent of that Statute was to take away the Manner they formerly had, of transferring Interests to Lands, by Signs, Symbols, and Words only; and therefore, as a Livery and Seisin on a Parol Feoffment, was a Sign of passing the Freehold before the Statute, but is now taken away by the Statute; so I take it, that the Cancelling of a Lease, was a Sign of a Surrender before the Statute, but is now taken away, unless there be a Writing under the Hand of the Party. And the Words, *viz. By Act and Operation of Law*, are to be construed a Surrender in Law, by the taking a new Lease; which being in Writing, is of equal Notoriety with a Surrender in Writing.

2dly. I am of Opinion, that if the Lease for Years continued in Being till the Lease for Lives was made, &c. as it seems by the Case that it did, then that Interest which passed from *Richard Close* to *William Mac-Cullogh*, did not pass by Livery and Seisin, so as to work a Discontinuance of the Estate for Life, but only by Way of Release to the Tenant for Years, and by Way of enlarging of his Estate; for it was a Reversion depending on a Lease for Years, and passes by Way of Grant and Attornment to a Stranger, and by Way of Release to the Tenant himself; and such Grant and Release transfers no more than the Tenant for Life might lawfully pass, *viz. an Estate during the Life of the Tenant for Life*; and consequently, the particular Estate for Life was in Being when the contingent Remainder came in *esse*; and therefore I think the Plaintiff must have the *Postea*. 19 H. 6. 33. Cro. Eliz. 487. Brook Surrender 49. Tit. Dower 55. *Hugh Cholmly's Case*.

Kellet versus Carthymore.

WILLIAM KELLET brings an Ejectment on the Demise of *Philip Savage*, *Thomas Maule*, and *John Kidmore*, against *Honora Mac-Carthymore* of the Premises in the Declaration: On Not Guilty, the Jury find a special Verdict; that the Plaintiff's Claims, by Letters Patent from the Crown, and that *Daniel Mac-Carthymore*, on the 22d of August, 1641, was seized in Fee of the Premises; and that afterwards, *viz. the 14th of August, 1647*, but Indenture of Feoffment, conveyed the Premises (*inter alia*) to the Marquess of *Antrim*, and *Alexander Mac-Donnel* and their Heirs, to the Use of the said *Mac-Carthymore* and

and Dame *Sarah* his Wife, and the longer Liver of them ; and after their Decease, as to one Moiety of the Premises, to the Use of the Heirs Male of the said *Sarah*, by the said *Daniel Mac-Carthy*, and the other Moiety to the Use of the said *Sarah* and her Heirs. They further find, that the Premises were seized and sequestred, the 1st of May, 1653, on Account of the Rebellion, which begun the 23d of October, 1641. They find the vesting Clause, in the Act of Settlement, and the Clause, Fol. 540, that the King shall have Power to nominate Commissioners, who are authorized to put the King's Declarations and Instructions in Execution ; and what they do in pursuance of the same, is declared to be good, firm, and effectual in Law, to all Intents and Purposes ; and that they, and every of them, are ratified and confirmed to the final Settlement of every such Person, their Heirs and Assigns, according to such Decrees, Orders, Sentences, and Judgments as have been, or shall be, by the said Commissioners, respectively given for or concerning any Matter cognizable by them against his Majesty, his Heirs and Successors, and all and every other Person and Persons whatsoever, their Heirs and Assigns, any Thing in the said Declaration and Instructions notwithstanding. They find, that *Daniel Mac-Carthy* put in his Petition before the Commissioners, setting forth, that he was seized of the Premises the 28th of October, 1641, and for many Years after : That he was an innocent Papist, and prayed to be restored.

That *Daniel Mac-Carthy* died the 14th of January, 1662. That the said Dame *Sarah*, and *Charles Mac-Carthy*, Son of the said *Daniel*, put in their Petition, setting forth the said Settlement, and alledging, that *Daniel*, at the Time of making the said Deed, was Innocent, and that the said *Sarah* and *Charles* are innocent Papists ; on which there was a final Hearing the 28th of July, 25 Car. 2. and on such Hearing it appeared, the said *Sarah* was and is an innocent Papist, and that *Daniel Mac-Carthy*, in his Life-time, and till the Time of his Death, was an innocent Papist, and that the said Settlement appeared to them ; and therefore they Order and Decree, That the said *Sarah* is an innocent Papist, within, and according to the Meaning of the said Act ; and that the said *Daniel Mac-Carthy*, in his Life-time, *quoad hoc*, was an innocent Papist ; and that the Claimant *Sarah*, be forthwith restored ; and that she and her Assigns may hold and enjoy the Premises, except, as is after excepted, by Virtue of the said Feoffment, and by and after the Death of the said *Mac-Carthy*, did of Right, or ought to come to her, for and during her natural Life, she the said Claimant having claimed no other Estate for Life by her said Claim.

They find further, that *Charles* is dead, and *Honora* is his Widow, and in Possession by Jointure, and that *Randal*, Son and Heir of *Charles* is living. And 'twas argued by the Chief Baron.

First, It is plain by the vesting Clause in the Settlement, all Lands that were in Seisin and Sequestration, were vested in the Crown, as a Royal Trustee, to settle the Adventurers and Soldiers in the Lands that were justly forfeited to the Crown, of which they were in Possession,

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in May, 1649, and such innocent Persons as were to be restored in their own proper Lands. And then comes the divesting Clause, which says, That the Act is not to extend to the vesting any Lands or Tenements of any innocent Papists, their innocent Heirs, Executors, Administrators, and Assigns; but it appears, both by the Declaration that is incorporated with the Act, *Fol. 518*, and by the Instructions, *Fol. 525 and 542*, that the then innocent Persons were not to be restored immediately, nor is the divesting Clause, so to be construed, to take the Lands again from the King, till they had made their Innocence appear before the Commissioners: For since the Statute divests the Lands of innocent Papists, and of their innocent Heirs, Executors, and Administrators, it appears by the Declaration and Instructions, that the innocent Papists were to make their Innocence appear, before they could be restored to their Lands, or intitled to a Restitution.

Now as to the Innocence of Papists, and their Restitution to their former Lands, there were three Cases that chiefly happened before the Commissioners on this Head.

First, Of Innocents restored by the Decree of the Commissioners.

Second, Of Innocents left to the Law.

Third, Of Innocents *quoad hoc*.

First, As to Innocents restored by the Commissioners, the Case was thus, *viz.*

If there was any Soldier or Adventurer that was in the Possession of any Land, to which an innocent Papist claimed to be restored, if the Soldier or Adventurer did not deny the Land to be the Estate of such Papist, then such Soldier or Adventurer was to be reprized, and the Papist to be restored to his Land, if he made out his Innocence; and then the whole Contest between the Papist and the Adventurer was, whether the Papist was Innocent; and if that was proved, the Lands were thereby divested out of the Crown, and the Papist restored to the Possession, the Adventurer being first reprized in other Lands.

Secondly, Of Innocents left to the Law.

This was where a Papist was innocent, and pretended a Title to Land, and summoned the Proprietor to appear before the Commissioners; and the Proprietor not only denied his Innocence, but likewise the Title of the Papist claiming the Estate: There if his Innocency was found, he was found Innocent at large, and left to the Law to try his Title to the Estate; and by the Act of Explanation, such Adventurer was within three Months after the Sitting of the Commissioners, for the Execution of the Act of Explanation, to make his Election, whether he would deliver up and relinquish his Possession, and resort to Reprizals, or abide the Trial; and if he chose to abide the Trial, then he was to be excluded from any Reprizal, though it went against him; but the Papist Claimant was not to give in Evidence any other Title, but what he exhibited in his Claim, before the Commissioners for the Execution of the former Act.

Thirdly, Of Innocents *quoad hoc*.

This was where there was a Decree of Innocence to such Lands, where there was no Soldier or Adventurer in Possession, or to be sum-

summoned ; and where there was no Person to be summoned, as Possessor of the Lands, there the Commissioners for the Execution of the said Act of Settlement declared them Innocent, *quoad hoc* ; and here the Statute mentions the Grounds on which these Decrees were made, *viz.* That it arose from an Invention and Stratagem of the Papists ; that they used to claim such Parcels of Lands, to which no Opposition was made ; and when the Commissioners had declared the Claimant Innocent, they would, by Virtue of such Decrees of Innocence, claim Title to great Possessions ; which if they had claimed at first, and summoned the Adventurers to defend them, they would not have been found Innocent ; and therefore to chide such Artifices, where small Parcels were claimed, and no Person came in as Adventurer or Soldier, to oppose their Pretensions, they were used to declare them Innocent *quoad hoc* : And these Decrees were by the Act of Explanation made valid, and not to intitle such Claimant to any other Lands, to which he had not exhibited his Claim.

Our Case falls under this third Head ; for *Daniel Mac-Carthy*, who made the Settlement in 1647, was declared (Innocent) *quoad hoc* the Lands in Question, and *Sarah* his Wife is declared an innocent Papist, and she shall be forthwith restored to the Premises, except what is after excepted, by Virtue of the Feoffment ; and by and after the Death of the said *Daniel*, did or ought of Right to go to her, for and during her natural Life, she the said Claimant, having claimed no other Estate than for her Life by the said Claim.

Now the Question is, Whether when *Sarah* is Tenant in Tail of one Moiety by Feoffment, and of the other Moiety in Fee, she is to be reduced, by the Decree of the Commissioners, to an Estate for Life ? The Question.

And I am of Opinion, that she still continues the Estate, which vested in her before the Claim.

First, Because the Decree of the Commissioners does not make a Title to the innocent Papist. And here there is a manifest Difference between the Decree of the Adventurer and Soldier, and Person to be restored ; for the Certificate and Patent begins, and makes the Title to the Adventurer and Soldier ; for the Lands were forfeited to the King by the Rebellion. And though the Statute, 17 Car. Cap. 34. in *England*, had enacted, That the Lands forfeited, should be set apart by Lots, for the Adventurers ; yet such Lots being set out in the Time of the usurped Powers, created no Title to the Adventurers ; but the innocent Papist that was to be restored by the Act, though the Lands were in Seisin and Sequestration, during the Usurpation ; yet if he were really Innocent, no Forfeiture was ever committed ; and therefore when the Commissioners declared any Person Innocent, he was restored to his Title that he had before the making of the Act, only he had no Action for the mesne Profits. And in this Case, they were in the same Condition with all other Cavaliers whose Estates were seized in those Times.

Secondly, 'Tis plain from the divesting Clause : For as soon as the Persons are declared Innocent, the Lands are divested out of the Crown ; and then they must be in the Proprietors, in the same Condition and

Manner as they held and enjoyed them before the Act. For the Commissioners had no Power to make any Alterations in Estates divested out of the Crown, for then they were out of their Power ; and when they had declared the Person Innocent *quoad* the Estate, it was out of their Authority and Power, and they would not make any Decrees to alter or change it.

Thirdly, This appears by the several Manners by which the Papist and Adventurer contested before the Commissioners ; that they did not determine the Title ; for if both the Claimant and Adventure agreed, that the Lands in Question were the Claimant's before the Rebellion, the only Question was, Whether the Papist were Innocent ; and if he were Innocent, he was then restored, because the Adventurer who was in Possession, admitted it to be the Estate of the Papist ; but when the Adventurer disputed not only his Innocence, but also his Title, there, if it appeared that he was Innocent, he was declared Innocent at large, and his Title left to the Law ; which shews plainly, they were never authorized to enquire. *Note*, The Title. And if the Question was, Whether the innocent Papist was entitled to the Lands, that was a Question meerly to be tryed by the Law. And therefore in the Act of Explanation, the Adventurer was either to make his Election in three Months, to take the Lands he had in Possession, subject to the Title of the Papist, or resort to a Reprizal.

Stat. 83.

Fourthly, Is it plain from the Clause of the Innocents *quoad hoc*, that though the Commissioners might declare him Innocent *quoad* Part of the Lands, that they could not declare him Innocent *quoad* Part of the Estate in the Lands, because the Words of the Statute are, That " no Decrees " wherein any Persons have been declared Innocent *quoad hoc*, shall " give any such Person or Persons any Title, by Virtue of any " such Decree, to enter upon or enjoy more or other Lands, than what " were particularly mentioned in such Decrees, but that all other Lands " of such Person as was decreed Innocent *quoad hoc*, which were questioned on Account of the War, shall remain to his Majesty, to the " Uses in the Act." Here 'tis plain, that this explanatory Act only extends to the Land in Dispute *quoad*, which the Papist is declared Innocent. And though the Statute admitted a Soleism in speaking, that a Man should be Innocent *quoad* some Lands, and not *quoad* others, which was to avoid a greater Inconvenience, *viz.* that a Proprietor should be turned out of his Estate, without ever being summoned or heard, or any Opportunity given him to make his Defence, yet it will not thence follow, that we must admit a much greater Inconsistency, where no such Inconvenience would follow, *viz.* that he should be Innocent to an Estate for Life, in Lands, and not as to the Remainder or Reversion : For whether a greater or a lesser Estate was claimed, the Tenant was to be summoned, and the Attorney General, was to defend, where there was no Person in Possession of the Estate ; and therefore in this Case, if *Sarah* was intitled, as it appears she was, she was intitled to an Estate Tail, in one Moiety of the Land, and a Fee in the other, which the Commissioners by the Act had no Authority to change, alter, or abridge.

Fifthly, It would be the highest Absurdity, that the Commissioners should be intitled to alter the Titles of the innocent Persons, and is contrary to the whole Tenor of the Act; for that declares, That such innocent Persons are to be restored, and a Restitution must be to the Title they formerly had to the Lands, otherwise 'tis not a Restoration to an old Title, but a Creation to a new one.

Therefore I think that *Randal*, the Grandson of *Sarah*, is well intitled, by the Verdict, to the Estate; and therefore that Judgment should be for the Defendant.

Devit, Lessee of Cowper, versus the College of Dublin, in Ejectment.

THIS is an Ejectment, wherein *James Devit* declares against the Provost, Fellows, and Scholars of *Trinity College*, on a Lease made to him the 1st of *May*, 1704, for six Years, by *Arthur Cowper*. On Not Guilty, Verdict is given for the Plaintiff. On this, a Bill of Exceptions is entered on Record, wherein they set forth the Certificate, by which the Commissioners say, That it appeared to the Court, that these Lands were seized and sequestred in the Rebellion that broke out the 23d of *October*, 1641, and that these Lands were allotted to *Edward Cowper*, and certify their Judgment to the Lord Lieutenant and Chancellor, in proper Form; and on this Certificate, a Patent is made, *November* the 19th, *Anno* 18 *Car.* 2. to *Edward Cowper* and his Heirs, under the Rent, in the Certificate reserved; and that *Arthur Cowper*, Lessor of the Plaintiff, is Son and Heir of the said *Edward Cowper*.

The Bill of Exceptions further saith, That it was given in Evidence for the Defendant, that *Q. Elizabeth*, by Letters Patent, dated the 28th of *June*, in the 39th Year of her Reign, gave those Lands to the Provost, Fellows, and Scholars of *Trinity College*, and their Successors: And that they, the 21st of *November*, *Anno* 40 *Eliz.* granted them to *Maurice Fitzgerald* and his Heirs in Fee-Farm, under the Rent of 8 s. and that *Maurice Fitzgerald* was a forfeiting Person, *prout per Inquisitionem* set out.

In order to settle this Case, three Things are to be considered.

First, The general Frame of this Act, and what Persons are obliged to claim in Pursuance of it.

Secondly, The particular Construction of the College Clause.

Thirdly, The Consequence to the Titles of *Ireland*, if Claims should be allowed that are not saved in the Certificates.

First, Of the general Frame of the Act, and what Persons are obliged to claim by it.

By this Statute, all the Lands that were in Seisin and Sequestration were vested and settled in the King, without Office or Inquisition; but this was not for the King's meer Use and Benefit; but the King was in Nature of a Royal Trustee, for answering the several Uses and Intents of the Act; and this was in pursuance of the 17 *Car.* 1. C. 3, 4. in which

which several Lands were to be set out to such Adventurers as should advance Money for the Reduction of *Ireland*.

The Lands vested in the King, were to be divested by the Claims of the several Parties in Interest; and these Persons were by the Act of Parliament, to make their Claims by a certain Time appointed; the Words are, "That all Persons and Bodies, Politick and Corporate, who have not already put in their Claims before the Commissioners, do put in their Claims within the Space of thirty Days immediately after the Proclamation made by the Chief Governor, which Proclamation was not to be made till the Commissioners for executing the Act should arrive at *Dublin*, and should have met for the Execution of the Commission, but as soon after as might conveniently be, and that after the said Time should be expired, no Claim should be received, but the Party left without Remedy, and debarred for ever.

Now there are three Sorts of Persons particularly concerned in this Act.

First, The Soldier and the Adventurer.

Secondly, The Innocents that were to be restored.

Thirdly, The several Persons and Bodies Politick mentioned in the Act by Name.

First, The Soldier and Adventurer. And these are intitled not only in pursuance of the 17 *Car. 1. C. 34.* but likewise by the King's Royal Declarations, which are incorporated into this Act, and says, That the Lands and Tenements, which the Adventurers and Soldiers possessed the 7th of *May*, 1659, should be confirmed and made good to them; but those Persons, no Doubt, were obliged to claim, in Order to divest the Lands, which by the vesting Clause were in the King.

536.

This is plain from the two Clauses of making out Certificates; for by these, the Commissioners were impowered to make out their Certificate according to every Man's Interest; and on such Certificate, the Chief Governors, with the Advice of the Council, were to order Letters Patent, under the Great Seal. So that the Adventurer and Soldier being to begin a Title from the King, he was to make out his Right before the Commissioners, and the Patent was to be granted, not in the usual Way, where the Patents are *ex Gratia*, by Letters from the King, and *Fiat* to the Lord Chancellor; but these Patents were *ex Debito Justicie*, and founded only on the Certificate of the Commissioners, without any Order from the King.

504.

Secondly, The Innocents that were to be restored.

These come under the divesting Clause, which immediately follow after the vesting Clause in the King: The Words of the Proviso are, "That the Act should not vest, or be construed to vest the Lands of innocent Protestants, or innocent Papists, their innocent Heirs, Executors, or Administrators." Now these likewise were obliged to Claim, in pursuance of the Act, because they were obliged to make out this Qualification of Innocence; but when they had made that appear, they were not enforced to take out any new Patents, because they were not to begin any new Title from the King, but remitted to their old Title, to such Lands as they claimed, and the Lands

Ante 10.

came

came out of the Crown, not by any Patent or new Grant, but by the divesting Clause in the Act of Parliament.

But then the Adventurer and Soldier was to be reprized wherever such Innocent was to be restored ; and the Words are, *That he shall be forthwith reprized*. So that the Reprizal was to go *pari passu* with the Restitution. This appears by the enacting Clause, immediately following the divesting Clauses ; and also by another Clause in the Instruction.

Thirdly, The several Persons and Bodies Politick, mentioned by Name in the Act.

Those are of several Sorts ; some that were restored to their old Titles Estates, others that obtained new ones.

First, Those that were restored to their old Estates, and those by the first Act, were not obliged to claim, because they were not obliged to make out their Innocence, since they were declared innocent by Act of Parliament, nor were they obliged to make out any Title to their Estates, because they claimed by their old Title, to which they were remitted, and not by any new Grant from the King, and such were the Archbishop, Bishop, Deans, Duke of Ormond, and others.

But here a Distinction was made ; for my Lord *Clanrickard*, and several other Papists restored by Name in the Act of Parliament, entered into more Lands than they were entitled to, and therefore such Persons, who claiming under such Clauses, were by the Act of Explanation, to make out their Title to the several Parcels of Lands they claimed before the Commissioners, for the Execution of the Act, within such Time as should be by them limited, or in Default thereof, to forfeit two Years Value of the Lands in their Possession respectively.

Secondly, As to those particularly named in the Act, they were to begin new Titles, their Clauses are in Confirmation of Letters Patent, granted from the King, and then the Particulars of the Estate granted, appeared in the Patent, as in Sir *George Lane's* Clause 565, or else the Particulars of the Lands were mentioned in the Act of Parliament, as in Sir *Robert Southwell's* Clause 568, 569, and in these Cases, there was no Occasion to claim, because they had Title by Letters Patent, or by the Act itself.

So in the Duke of *York's* Clause, there seemed no Occasion to claim, which vests the Lands of the Regicides in the Duke of *York*, and the Reason is, because by the Instructions, it appeared that those Lands were ascertained by a Certificate, returned by the Commissioners into the Exchequer ; for it appears by Instructions, that the Commissioners were to return a Particular of their Estates in the Exchequer, upon their first Sitting to do Business ; and here no Reprizable Persons were in Possession, for the Regicides were in Possession, who were forfeiting Persons.

But in all other Cases, I take it, where the Persons were to begin a new Title from the Crown, and there are only general Words in the Act of Parliament, there they ought to claim, because the Commissioners are to ascertain the Particulars that are to pass by such Clauses, I can't say, but that if an Act of Parliament should grant in general Terms all the Estate of *J. S.* but that it would pass by the Act,

Act; yet such is the Wisdom of the Legislature, that where Property is concerned, the Statutes do never grant Estates and Interests, without ascertaining them in the Acts themselves, or without settling some Means, whereby they may be reduced to a Certainty, for such Act would breed Confusion, instead of a certain Distinction and Settlement of Property.

When these Persons that were particularly named in the Act, entered into their several Estates, those Adventurers and Soldiers that were possessed of them and ousted, were reprized, and these being favoured of the King, they easily obtained, that such as were ousted by their Claim, should be immediately reprized; and therefore we find, that in the Act of Explanation, those who were removed from the Duke of *Ormond's* Estate, and afterward reprized in *Catherlough*, should retain two Thirds of it, were possessed the 7th of *May*, 1659.

And there was such Numbers of those that came in on the Commissioners Stock of Reprizals, so many Innocents restored, whereby the Adventurers and Soldiers were reduced to a Necessity of claiming Reprizals, that the Stock of Reprizal fell short, and therefore the Soldier and Adventurer were by the Act of Explanation, retrenched one Third of what was their real due.

But it is the perfect Model of that Act of Parliament, that the Soldier and Adventurer was not to be removed out of what he was in Possession of, for any Restitution, 'till he was duly possessed of his two
801. Thirds; this is provided, both at the Beginning and Ending of the Act of Explanation; after this Retrenchment, there seems to be Room
884. made for every Body, in Pursuance of the Act of Explanation; for by this Act, if an Innocent claimed more than was his due, the Adventurer or Soldier in Possession, had it in his Election, either to give it up to
831. the Claimant, and have Recourse to the Stock of Reprizals, or choose it as Lot, and try it with the Claimant, who was to set up no Title, but what he had put into his Claim.

Two Years Time was thought a competent Time, in which all these Matters ought to be settled, and therefore a Clause was added to the Act of Parliament, that in Cases which should happen before the Commissioners, which were doubtful, and the Act found defective, in Points
868. necessary for carrying on the intended final Settlement, that the Commissioners, or any three of them, might acquaint the Lord Lieutenant or Chief Governor and Council, with their Proceedings and Doubts, and such Order for Amendment, enlargement of Period, Explanation and Direction, as should therein be made by the Lord Lieutenant and General Governor, and Council should be as effectual, as if the same had been inserted in the Act.

This is the Topstone and finishing of this Building; for it was apprehended by the Legislature, that some Time should be given, before every Man's Right should be settled and adjusted, and the Lord Lieutenant and Council were armed with a Power to fix every Man in his proper Settlement, so that there might never after be any Controversy or Contention about it; and this they've done by their Answer of Resolution
944. of Doubts. Where they've ordered, that where any Certificates of Letters

ters Patents shall have been passed to Persons entitled, they shall hold and enjoy the Land against the King, Bodies politick, and all Persons whatsoever, unless those whose Titles are saved in such Certificate. 944.

Now the Persons entitled, must be understood the Soldiers and Adventurers, who by the Act, were entitled to receive Certificates, for otherwise, the Confirmation would be utterly insignificant, for the Construction that is made by those who argue for the Defendants, is only, that if a Certificate be granted to those that have Right to them, they shall have Right; whereas the Meaning of the Act, was to make the Certificate Final to the Parties, that after they had been retrenched, they might never after be disturbed in that Part, which they enjoyed; but if the Construction were, that they were in all Points to be entitled to the Certificate, or else they were to be open to all other Titles, then it would amount to no Confirmation at all; and this Rule made for the final Settlement of all Adventurers and Soldiers, and their Security, would come to nothing.

Secondly, We come now to the Provision for the College, which in the Act of Explanation, stands thus: 582.

Provided always, and it is hereby enacted and explained, that no Lands whereof the Provost, Fellows and Scholars of the College of the Holy and undivided Trinity of *Queen Elizabeth*, near *Dublin*, were seized in Fee in the Year 1641, and are now in their actual Possession, nor any Lands held by Virtue of any Grant, Lease or Fee-Farm, from the said Provost, Fellows and Scholars, and forfeited to his Majesty, shall be disposed by Virtue of this, or the said former Act, but that they, and every of them remain, and be in the Provost, Fellows and Scholars, and their Successors for ever, subject nevertheless to the Payment of such Quit Rents for the said forfeited Lands, as Adventurers or Soldiers, by Virtue of this or the former Act, ought to pay, any Thing in this or the said former Act, contained to the contrary notwithstanding. 830.

This Clause is not only a Clause of Restitution, but likewise of Augmentation of Revenue to the College, and the Reason of Augmentation at this Time was, that the Restauration had in its Consequence lessened their Income; for during the usurped Power, the College had several Lands given them, which belonged to the Archbishop of *Dublin*, the Dean and Chapter of *St. Patrick's*, and Bishop of *Meath*, which by the Act of Settlement, were all restored to them again, and therefore the Lands held of them in Fee Farm, and forfeited to the King, were granted to them in Compensation, but whatever was the moving, or procuring Cause of this Grant, yet it was still a new Grant, and as such, it was to be expounded; so that as to the Lands which were held of them in Fee Farm, and forfeited to the Crown, these were an Augmentation, and Gift from the King, and the College was to begin a Title from him, and therefore they were to be passed to the College by Certificate and Patent, and they are not immediately vested in the College by the Act, 'till they are claimed, nor can they, as it has been argued for the Defendants, be immediately executed by the Act in the College, Ordinance, 1619. Cap. 74.

College, as the Statute which transfers Uses into Possession, and that for many Reasons.

First, Because there is no Description of the Land by Quantities, and other convenient Certainties, and therefore not being certain in themselves, must be reduced to Certainty by somebody else; for it can never be supposed, the Statute intended to execute the Lands, without setting out and describing the Particulars of the Lands that were so to be granted and conveyed.

Secondly, That which puts this Matter out of Doubt, is the Clause which obliges the College to pass a Certificate and Patent; the Words are, "That the Commissioners shall appoint Books to be made of the Allotments of Adventurers and Soldiers, the Augmentation of Bishops, and Provisions for the College of *Dublin*, and on Certificate, under the Hands and Seal of the Commissioners, expressing the Names of the Persons, with convenient Descriptions, Denominations and Number of Acres, that then the Lord Lieutenant shall grant a Patent, without any Letter or Warrant from the King.

By which Clause 'tis plain, that the Provisions, *viz.* all the Provisions of the College must be passed to them by Certificate and Patent, as well as the several Lots of the Adventurers and Soldiers, and there was the same Reason it should be so, because they were to begin a Title, and the Right was to pass out of the Crown to themselves, and if the Commissioners were to grant a Certificate, there must be a Claim before such Commissioners, for they could not certify a Right, 'till they had Notice there was such a Right in them.

Thirdly, There is another Clause in the Statute, that shews there was a Necessity that they should claim, and this is a Clause that stands subsequent to the College Clause, *viz.* provided nevertheless that no reprimable Soldier, Adventurer or Officer, shewing before the 5th of *June*, 1659, or Protestant Purchaser in *Connaught* and *Clare* be removed out of any Part of the Premises, which they are to have by this Act, before they be reprimed for the same, according to the said Statute and indeed, it is the whole Plan of the Act of Explanation, that the reprimable Person was to be actually reprimed, before he was to be removed to make Room for any Person that was to be restored; so that this Person being in Possession of the Lands, belonging to the College, was not to give up any, 'till such Time as he was restored to other Lands; and therefore the College must needs claim before the Commissioners, otherwise, it was only keeping, during the Time they were to claim, and then they would oust the Person in Possession, without any Claim at all, which is contrary to the whole Design and Tenor of the Act of Parliament.

Fourthly, This was the contemporary Exposition of the Act of Parliament, because they did actually claim in Pursuance of the Act, and these Claims have been read to the Court, and these can't be said to be *ex abundanti cautela*, since the Words of the Law require that a Certificate and Patent should be passed of them.

But those who have argued for the Defendants, have very much relied, that since the Words of the Act are, "That no Land held by

" Virtue

“ Virtue of any Grant, Fee Farm, or Lease from the College, and forfeited to his Majesty, shall be disposed of by Virtue of these Acts, but should be and remain to them for ever, any Thing in this Act to the contrary, notwithstanding;” That therefore every Disposition of these College Lands by the Commissioners, is absolutely void; that the Commissioners had no Power to dispose; that what they did was *coram non judice*, and that this Clause is to be construed, as the *non obstante* in Patents, and as an Exemption; and the Lands contained in this Clause, are out of the Power of the Commissioners.

It is very true, that if the Commissioners had no Power over those Lands, by Virtue of this Clause, and that their Disposition was void, then no Confirmation can operate, to make a void Clause good, nor would the Plaintiff have been within the Resolution of Doubts, if what the Commissioners had done was *coram non judice*.

But the Commissioners have Power over the Land granted to the College, and this appears plainly from what has been said already.

First, Because the Commissioners had a Power to declare whether the Lands had been forfeited or not, for they were to declare whether the Persons that held of the College were innocent or not, and if this Clause was to be construed as an Exception out of their Power, then they would make no Declaration of the Nocency or Innocency of the Persons holding the Lands, and consequently the College could have no Title, for they derive Title by the Attainder or Outlawry of *Fitzgerald* for High Treason, for they’ve set out the Inquisition, though they say he is guilty *per inquisitionem*, and the Title they set upon this Record is, by the Declaration of Nocency, by the Commissioners set forth in the Plaintiff’s Title, so that if the Declaration be void, the College can have no Title, which concludes plainly, these Lands are not out of the Verge or Power of the Commissioners.

Secondly, If this was an Exemption of the Lands out of the Power of the Commissioners, they would have no Authority to reprimand such Adventurers and Soldiers, as were turned out by Virtue of this Clause; and by the Clause 884, such Adventurer and Soldier was not to be removed, till he was reprimanded; so that to make such Construction on this Clause, as if it extended to exempt the Lands, would be to construe it in a Manner, that would make it inconsistent with that Part of the Act.

If then the College ought to claim, then by the Clause 542, 543, they are debarred by their own Non-claim; and if the Certificate was not void, but only voidable by the Clause of the College, then by the Clause 540, but more especially by the Act for Resolution of Doubts, such Certificate is confirmed against all Persons, and Bodies Politick.

Thirdly, There is no Doubt but the Act of Resolution of Doubts, confirms the Certificate against the Claim of any innocent Person, that is not expressly mentioned within the Certificate, and the Clause for the Innocent is much stronger penned, than that for the College; the Words are, “ That this Act, or any Thing therein contained, shall not vest or be understood, or construed to vest in their Majesties, their Heirs and Successors, or otherwise to prejudice or take away any Estate from
“ any

“ any innocent Papists, their innocent Heirs, Executors or Administrators,” and yet the confirming Clause sets up the Certificate against their Title, if they be not expressly mentioned in such Certificates.

Now the Words in the Innocents Clause, That they shall not vest, are much stronger than the Words in the College Clause; that they shall not be disposed of the Innocents, is a Clause of Restitution to the Land, to which the King had no Title by forfeiture; the College Clause is a new Grant of Lands under a Forfeiture; if therefore by the Resolution of Doubts, the Person that claims by Certificate, is to hold against the Title of the Innocent, he ought to hold against the Title of the College, where 'tis not mentioned in the Certificate.

To consider the Consequences of this Doctrine, if this Certificate should be adjudged void.

And this Twofold.

First, That the Adventurer and Soldier would be perfectly stripp'd of his Inheritance, because he could not be reprized, which were to destroy the Title of a Person who was a Purchaser for valuable Consideration, under several Acts of Parliament, wherein by those Acts he was entitled to a Relief, and where he had likewise paid an half Years Rent for the King's Royal Bounty, which went towards the Charges of the Act, and likewise one Penny *per* Acre to the Commissioners and Sub-Commissioners, for settling the Act, and likewise retrenched by the Act of Explanation, one Third of his real Due, and by the Terms of that Act, were not to be removed, 'till he was reprized; now if after all, this Construction of the Defendants were to take Place, after all these Payments and Deductions, he would be turned out without any Satisfaction at all, whereas the College only suffers by their own Laches and Negligence, where they ought to claim.

Secondly, The last and most terrible Consequence of all, if this Certificate should be adjudged void, is, that it would introduce an Uncertainty of Property, through the whole Kingdom: That which is the present Happiness of the Kingdom of *Ireland* is, that after all the Revolutions and Changes, which have been in their Property, they are now come to so firm and lasting a Foundation, that it is to be hoped, will never be shaken; and the very Basis of this Establishment, is this Certificate and Patent; this is the Beginning of every Man's Title; Men have no Deeds nor Evidences higher to shew, whose Estate it was before the Date of the Certificate,

I take it therefore, that these Laws of Settlement and Explanation, are to be construed according to the Intent of the Legislature, for the Quiet of the Kingdom; and always liberally to be expounded to the Settlement of Persons interested, and 'twill be a very dangerous Thing to the Peace of the Kingdom, if the Certificate and Patent should in any Case whatsoever, be construed to be *coram non judice*.

I should have all manner of Tendernefs for the Right of the College; they are Nurseries of Religion and Learning, and therefore all Donations for Increase, and Augmentation of their Revenue, are to be liberally expounded: But I dare not make such an Exposition in Behalf of the College, as would let in a general Uncertainty into the Property of the whole

whole Kingdom ; and if I should adjudge the Certificate and Patent to be void, I don't know what would be the Consequence of such a Judgment ; how many other Certificates and Patents may be contrary to the Direction of the Act, is what no Man living can foresee, and if any Person should meet with Success on such a Question as this, and receive a Judgment in his Favour, that a Certificate and a Patent are void, it would beget infinite Questions on other Certificates and Patents, and so by Degrees, the whole Act of Parliament would be unravelled ; on Statutes that are made for quieting the Kingdom, such Resolutions are to be made, as tend to the Peace of the Nation ; and 'tis better the Non-claimant should lose the Right he would have had, if he had claimed, than a general Uncertainty should have been made in Property, by the Negligence and Laches of those who have not claimed.

It is a general Rule of Judgment, that a Mischief should rather be admitted, than an Inconvenience ; it is only a Mischief to the Defendants, if their Right be barred by their own Laches in not claiming, but it will be an Inconvenience to the whole Kingdom, if the Certificates and Patents, (under which the Titles, Purchases and Settlements of this Kingdom should stand,) shall be adjudged void, and *coram non judice*, wherefore I think Judgment should be given for the Plaintiff.

Pepeys versus Crereton.

THIS is an Action on the Case on a Promissory Note, whereby the Defendant promises to pay the Plaintiff 23 *l.* at the Day of the Marriage of the Defendant, or the Day of his Death.

So there is a second Count or a Promise, to pay 23 *l.* to the Plaintiff, at the Defendant's Day of Marriage, or Day of Death ; the Plaintiff avers, that the Defendant married *Lucy Grave*, whereby the Action accrued.

The Defendant demurs generally.

The Plaintiff joins.

To this Declaration, it has been objected, that there being two Days of Payment mentioned, *viz.* the Day of Marriage, and the Day of Death ; and the Defendant being to do the first Act, that is to pay the Money, that he, according to the Case of *Sir Rowland Hayward*, has 2 Co. 35. his Election, which of the Times he will make the Payment.

But I think in this Case, the Defendant has no Election, but must pay the Money on his Marriage ; for *Sir Rowland Hayward's* Case, and all Cases upon Bonds and Promises, turn upon this general Rule, that all Contracts are to be taken according to the Intent of the Parties expressed by their own Words, and if there be any Doubt in the Sense of these Words, such Interpretation must be made, as is most strong against the Grantor or Obligor, that he may not by the obscure wording of the Contract, find Means to evade and elude it.

Therefore, if a Man grants a Rent of 20 *l.* or a Robe to one and his Heirs the Grantor shall have the Election, for he is the first Agent, by the Delivery of one, or the Payment of the other, *viz.* he having

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by his Contract undertaken to do one Act or the other, he has still left it in his Election to chuse which he will do; but if a Man grants a Rent-Charge to another, out of his Lands, 'tis but one Act to be done, and the Grantee hath two Remedies, either by Way of Distress, or Writ of Annuity; for the Grantor having granted it, he has charged his Person, and having granted it out of his Lands, he has charged his Lands also; and having thus granted two Remedies, it must be in the Election of the Grantee, who is to have the Benefit of these Remedies, which he will have.

Ploud 172.

So in the Case of *Hill and Grange*, if a Man makes a Lease for Years, and reserves a Rent payable at *Michaelmas* and *Lady-Day*, and there is a Condition, that if the Rent reserved be behind, and unpaid at the said Feasts, and 10 Days after, that then the Lessor shall re-enter; the Construction of such Leases has been, that the Rent is due at the Day, so that the Lessor may distress for it; but to save the Condition, the Lessee may tender at the last of the 10 Days, because those are Days of Grace, given by the Condition, that the Lessee may save his Estate by the Tender; and therefore if he tender at the last of the 10 Days, it is sufficient, and that is likewise the Day for the Lessor to demand the Rent, in Order to have Advantage of the Condition broken.

x Vent. 58.

In the Case of *Resvill and Coates*, the Condition of the Bond was, that the Obligor should bring the Son and Daughter of J. S. at their full Age, to give such Releases as a third Person should require; the Defendant pleads, that the Son is alive, and under Age, to which the Plaintiff demurs, and the Demurer allowed; for the Force of the Bond is not suspended, 'till they are both of Age; because 'tis to be taken not conjunctively, but respectively and distributively; for the Obligor undertakes, that the Daughter shall release at her full Age, as well as the Son, and if she does not, the Condition is broken.

x Lev. 54,
55.

And so universally, when any Person undertakes to pay Money on two several Contingences, the natural Sense of such Contract is, that he must pay it at either of the said Contingences for the putting in, that he shall pay at the one or other, is for the Benefit of the Obligee or Promisee, that he may have his Money at any of the Contingences happening; and this is the Genuine Signification of those Words, and likewise, that which is strongest against the Promisor or Obligor; for if he would have the Payment suspended by both the Contingences, the Promisor or Obligor must take Care in express Words to limit the Payment after the happening of both Contingences, and there is an express Resolution in the Case of *Sayer and Gleane*, in Debt on an Obligation; that if a Ship put to Sea, and either the Goods or the Obligor came safe, he should pay such a Sum over and above the Use allowed by the Statute; the Defendants plead, that the Obligor died before he returned, and it was objected, that the Defendant had an Election to pay, at which of the Contingences he would; and therefore the Executors of the Obligor were excused, because their Testator never returned safe; but 'twas resolved, that the Law supplies the Words *which should first happen*, and no Prejudice to the Executors of the Obligor, because it was the Sense of such Contract, that Payment should arise on either of the Contingences.

But it is much stronger in this Case, because the Promise is to pay at the Day of Marriage, or Day of Death ; now if the Payment were not to be made at the Day of Marriage, that Part of the Promise were vain and idle to no Purpose ; for since 'tis certain all must die, the putting into the Contract the Day of Marriage, would be altogether insignificant, since according to the Defendant's Exposition, the Payment could not be made on the Day of the Marriage of the Defendant, but must wait 'till the Time of his Death ; and therefore Judgment must be for the Plaintiff.

Fitz-Patrick versus Strong & al.

IN Debt upon a Bond, the Defendant craves Oyer of the Condition, which was, that if we the above bound *John Strong* and *Patrick Strong*, or either of us, any or either of our Heirs, Executors or Administrators, do well and truly pay to the above-named *Lawrence Fitz-Patrick*, his Executors, Administrators and Assigns, all Sum or Sums of Money which shall appear to be due upon a fair Account stated, on account of Rent, or Arrears of Rent, due the first Day of *May* last, at or before the first Day of *November* next ensuing the Date hereof, then the above Obligation to be void.

The Defendants plead, that on the first Day of *November* then next ensuing, the Date of the Obligation, viz. 4 die Nov. 1709 at *Dublin*, in the Parish of *St. Michael*, in the Ward of *St. Michael*, they paid to the Plaintiff all such Sum and Sums of Money, which then appeared to be due on a just Account stated, on the Account of Rent or Arrears of Rent due on the first Day of *May*, in the Year aforesaid.

To this the Plaintiff demurs, and shews for special Cause, that the Defendants had not shewn any particular or certain Sum of Money that they had paid to the Plaintiff, nor what was the Value of the Rent, or Arrears of Rent, due the first of *May*.

The Defendants join in Demurrer, & *judicium pro Quer.*

It is here to be considered, in what Cases the Defendant may follow the general Words of the Condition, and where he must plead particularly, so as to make a Bar, that is Substantive and Traversable by the Plaintiff.

The general Rule is, that every Bar being a Confession, and Avoidance of the Plaintiff's Action, must be Substantive and certain, with an Avoidance of the Plaintiff's Demands, which he may traverse, and thereon go to the Issue ; because the Declaration of the Defendant stands confessed, as far as it is not avoided by the Defendant, as the Obligation in the Penal Sum in this Case stands confessed, unless the Defendant shews some other less certain Sum contained in the Condition, and by him paid in Avoidance of it.

But there are Cases in which the Defendant may plead a Performance, according to the generality of the Condition, and it shall come on the Plaintiff's Part to assign a Breach, and these are,

First,

First, Where the Bar is in the Negative, there 'tis impossible for the Plaintiff to go to an Issue, for a Negative can't be proved, and therefore the Plaintiff must assign a Breach, by replying in the Affirmative, on which the Issue may be properly taken; as if a Condition of a Bond is, that the Defendant should not deliver Possession to any Person but to the Lessor, or to such Persons as him lawfully evicted; the Defendant pleads, he did not deliver the Possession to any, but such as him lawfully evicted; here it comes on the Plaintiff's Side, to assign a Breach, and shew, that he delivered the Possession to some Person that had not lawfully evicted him, because the Condition being in the Negative, the Defendant's Plea must necessarily be in the Negative also; and the Plaintiff to assign a Breach, must assign a Fact directly opposite to such Negative Condition, 1 Lev. 83. *Pullen versus Nicholas*; so if an Obligation be to perform an Award, and the Defendant pleads no Award made, 'tis not sufficient for the Plaintiff to shew an Award made in his Replication, unless he shews also a Breach, because the Defendant's Plea is in the Negative, and the Plaintiff, by replying in the Affirmative, does not shew the Obligation to be broke, for the shewing such an Award, leaves it in certain, whether it was performed or not; and his having shewn that there was an Award subsisting, does not make it appear that he was entitled to the Money, unless he also shews that Award to be broken, *Hayman versus Gerrard*, *Saund.* 102. the Condition of a Bond was, that the Obligor should render an Account of the Goods of *William Narrel*, deceased, which came to his Hands, and make an equal Dividend between him and the Obligee; the Defendant pleads, no Goods came to his Hands, the Plaintiff must reply what Goods came to his Hands, and over that, assign the Breach that he did not account for them, because the Plaintiff by replying the Goods came to the Defendant's Hands, leaves it on his own shewing indifferent to the Court, whether he be entitled to the Penalty of the Obligation or not, unless he goes over and shews, that the Defendant did neither account nor divide them.

Secondly, Where the Condition refers to a Multitude of Particulars, which may never be brought to Issue by the Parties; there 'tis sufficient for the Defendant to plead in general, and it lies on the Plaintiff, by way of Replication to assign a Breach, because for the Defendant in his Plea to descend to that great Variety of Particulars, would overcharge the Record to no Purpose, and would tend to intangle the Defendant, who would fail, if he mistook in pleading any of them; whereas the Plaintiff, by choosing out of that Variety that singular Matter, by which the Condition is broken, brings it to one proper single Issue; and therefore in this Case, the Modern Lawyers have relaxed the ancient Rules of pleading, which required the Bar to be sufficient and substantive, and in such Cases, have only required the Defendant to follow the generality of the Words of the Condition, without descending to Particulars.

Thus anciently, where the Bond was for Performance of Covenants, they held it necessary to demand Oyer of the Condition, and likewise of the Covenants, and to plead particularly the Performance of each of them, 26 Hen. 8. 5. but this was found to be very inconvenient, be-

cause

cause this over-loaded the Proceedings with a Recital of all the Covenants, and exhibiting to the Court a Performance of each of them, whereas one might be in Controversy between the Parties, and if one only were broken, 'twas as sufficient and effectual for the Recovery of the Penalty, as if there had been a Breach of them all; and therefore it was thought much more convenient, that the Defendant should plead a general Performance, and the Plaintiff should assign a Breach in such particular Covenant, as he insisted on to be broken.

But this Rule touching the Proceedings in general, fails in these four Particulars :

First, Where some of the Covenants are in the Negative, for a Negative can't be said to be performed in a proper literal Sense, (though the not doing, may improperly be called a Performance) and therefore on a special Demurrer, the Defendant's Plea would be bad; *aliter* on a general Demurrer, 1 Leon. 311 Cro. Eliz. 232. 8 Co. 132.

Secondly, Where some of the Covenants are in the Disjunctive, there the Defendant can't plead Performance generally, because both the Alternatives are not to be performed, and by pleading Performance generally, he does not shew in certain, which is performed by him, and therefore this is bad on a special Demurrer, which shews the Want of that Certainty; but where the Plaintiff does not demur for want of such Certainty, it shall be intended, that the Defendant performed one of them, and therefore good enough,

But in both these Cases, where the Covenants are in the Negative, or the Disjunctive, and the Defendant pleads Performance generally, and the Plaintiff replies and assigns a Breach which is ill assigned, and the Defendant demurs, the Plaintiff shall not take Advantage of this ill pleading of the Defendant's, because by his Replication, he admits the Performance of all the other Covenants, but that only where he undertakes to assign the Breach, 8 Co. 132. Hob. 14, 199.

Thirdly, Where the Covenants are to do a Matter of Law, as to convey, discharge an Obligation, ratifie or to confirm, &c. there it must be pleaded specially, because it being a Matter of Law to be performed, it ought to be exhibited to the Court, to see it be well performed, who are Judges of the Law, and not to a Jury who are Judges of the Fact only, 1 Leon. 172. Dyer 229.

Hob. 69,
107.
1 Leo. 297.
1 Vent. 99.

Fourthly, Where the Covenants are Matters of Record, because that must appear to be done by the Record, and therefore not to be tryed by the Jury on the general Issue, whether the Covenants are performed or not, Co. Lit. 303.

This general Manner of pleading is allowed, not only in Case where, on a Bond to perform Covenants, the Defendant pleads Conditions performed; but it obtains in all other Cases, where the Defendant's Plea would be overcharged with useles Matter, by descending to Particulars; and by following the general Words of the Condition, the Plaintiff can properly draw it to a single Point, by assigning a Breach; as if the Condition be, that the Defendant at all Times, and at Request, shall deliver the Fat and Tallow of all the Beasts, &c. the Plaintiff must reply and assign a particular Time when he did not deliver it; for if the

Pleadings were not so contrived, as to pursue the Covenants, the Defendant would be obliged to fill the Pleadings with Multitudes of useless Deliveries, which might not be controverted by the Plaintiff, whereas the Plaintiff by assigning a particular Breach in the Non-delivery at any one Time, may bring the whole Matter in Question, *Cro. Eliz.* 749.

Here likewise there is another subdistinction, *viz.* when the Condition consists of Matters to be done, that lye within his own Knowledge, for there, though they consist of great Variety, yet he can't plead generally, but must shew the particular Performance of all Matters in his Plea, as if the Condition was, that the Defendant, Bailiff of the Plaintiff's Manor, should render an Account of all the Rents of the Manor he has received, before such a Day; there, if the Defendant plead he has accounted for all the Sums before such a Day, 'tis ill, but he must shew the particular Sums, because it lies within his own Knowledge only, *Cro. El.* 749. *Saunds* and *Malverer*. So if the Condition be, that the Defendant should deliver Briefs to all Churches within such a Time, and should collect the Money given upon them, and should deliver it over to the Plaintiff; there the Defendant can't plead generally, that he has delivered the Briefs, collected the Money, and delivered it over to the Plaintiff, but he must particularly shew what Briefs were delivered, what Sums were collected, and that he delivered them over to the Plaintiff, because such particular Facts lie within his own Knowledge only, *1 Sid.* 215. *Woodcock's Case*.

The Rule is *non sunt Longa quibus nihil est quod demere possis*, and therefore the Length of the Defendants Plea is unavoidable, where 'tis impossible to make it shorter; but where it lies as well on the Knowledge of the Plaintiff as the Defendant, there the unnecessary Prolixity is avoided, if the Defendant pleads generally, according to the Words of the Condition, and it comes on the Plaintiff's Part to assign a Breach.

But where there is no such Prolixity in the Defendant's Plea, there he can't depart from the Rule, by shewing a general Performance, according to the Words of the Condition, but he must plead it specially, by shewing in certain how 'tis performed, or else he does not plead a proper and substantive Bar, according to the Rule of Law, by which he should confess, and avoid the Plaintiff's Declaration; as if the Condition be, that the Defendant pay the Plaintiff all Manner of Costs and Charges that *J. S.* shall charge the Plaintiff with, for carrying on a Suit; the Defendant pleads he did pay all Manner of Costs and Charges; this is ill, because it relates to one single Point, which may and ought to be sued in certain, in Order that the Plaintiff may take Issue on it, *1 Lutw.* 419. *Nel. Lutw.* 126-7.

So in the Case at Bar, it is not enough for the Defendants to say, that the Defendants paid to the Plaintiffs all such Sums of Money, which then appeared to be due on a just Account stated; because he does not shew any Sum in certain; and not shewing what is paid there, there is no proper Issue for the Jury to try; and therefore saying that at such a Time, and such a Place, he paid all Sums, is shewing nothing in certain, on which the Plaintiff can descend to Issue; and therefore the Obligation stands confessed, since the Defendant does not shew to the Court,

Court, that it is properly avoided by the alledging the Payment of any other Sum, that by the Condition, is to be paid in Discharge of the Obligation, and consequently the Plaintiff's Declaration stands good; *Et ergo judicium pro Quer.*

Note, Where the Condition of a Bond is to perform Covenants in an Indenture, and the Defendant bringing the Indenture into Court, pleads that there are no Covenants, the Plaintiff may in his Replication, pray that the Indenture may be enrolled, and on such Enrollment, he shall have Judgment on demurrer, because by the Enrollment, it is become Part of the Plea, and it appears, that the Defendant on his own Knowledge, has pleaded a false Plea, 1 *Saund.* 316.

Lodge, Lessee of Russel, versus Jennings, *Vil.*

THIS is an Ejectment, brought by *Joseph Lodge*, Lessee of *John Russel*, against *Penelope Jennings*, and on not guilty pleaded, the Jury find, that *Samuel Jennings* the 11th of *May*, 1708, made his Will, which they recite in *hac verba*, in which he gives the Lessor of the Plaintiff all his Real and Personal Estate; they further find that the Will was signed, sealed and published, and declared by the Testator the 11th of *May*, 1708, in the Presence of *Henry Rhodes*, a subscribing Witness, who signed as a Witness to the said Will, in the Testator's Presence; they further find, that the 12th of *May*, 1708, the said Will was signed, sealed and published by the said Testator, in the Presence of *Thomas Loupbier* and *Edward Harmer*, other subscribing Witnesses, and that *Loubier* and *Harmer*, then signed as Witnesses, in the Presence of the said Testator; they find that *Russel* demised to *Lodge*, that *Lodge* entered and was ejected by the Defendant; they say farther, that if the said *Rhodes*, *Loubier* and *Harmer*, subscribing their Names as aforesaid, are three sufficient Witnesses according to the Statute, and as the Law requires; and if the said Will so proved be a good Will in Law, and sufficient to transfer the House or Tenements, and Back-House, &c. to the said House, then they say she is guilty; and if the said three Witnesses are not sufficient, then they say she is not guilty.

On this special Verdict, there are these two Points, *viz.*

First, Whether the Lessor of the Plaintiff has a sufficient Title, the Verdict not finding, that *Jennings* the Devisor was ever seized or possessed, or died seized or possessed.

Secondly, Whether this be a good Will, within the Statute of Frauds and Perjuries.

As to the first, I think it is sufficiently found for the Plaintiff, though it be not found that the Testator was ever seized or possessed, or died seized or possessed, because they find the Defendant is guilty of Trespass in Case this is a good Will, and it is a certain Rule in all special Verdicts, that if the Jury find the Point in Issue, and only put a special Doubt to the Court in Matter of Law, 'tis a good Verdict; but if they don't find a sufficient Matter of Fact to bring Light enough to the Court

Court to resolve that Doubt, then 'tis an imperfect Verdict, and an immaterial Issue, and a *venire facias de novo* shall be awarded.

This Rule is founded on clear and evident Reason, and undeniable Authority.

It is founded on clear and evident Reason, because the Jury are Judges of the Fact, though the Judges are to judge and determine the Law arising on that Fact; now the Jury being Judges of the Fact, they in finding the Gift of Action, have taken upon them to find every Thing that is necessary to make the Defendant guilty, if the Point of Law be resolved for the Plaintiff: In finding the Defendant guilty, they find every Thing that is material to make him so, in Case the Doubt of the Law in which they are not resolved, appear to be for the Plaintiff, and the Court can't intend any Thing to the contrary of the finding; therefore in this Case, the Court can't intend the Devisor was not seized, or did not die seized, for then instead of resolving the Point of Law, they would take on them to be Judges of the Fact, which is not their Province: If they should intend that, the Devisor was not seized, or did not die seized, they must intend the Defendant was not guilty, though the Doubt of Law was for the Plaintiff, which would be an intendment against the express finding of the Jury, and then the Court, who are no Judges of the Fact, would resolve against the Judgment of the Jury, who are Judges of the Fact.

Again, it is the Nature of a special Verdict, that some especial Point at Law be found; now when that special Point is removed by the Resolutions of the Law, it is as if that were only a general Verdict, and it would be absurd for the Judges to intend any Thing contrary to such finding, and the special Verdicts are drawn up with a *fi, i. e.* if the special Point at Law be for the Plaintiff, they find the Defendant guilty, if for the Defendant, not guilty; and the Judge would not permit the Jury to find such special Verdict, if all Matters necessary to come to that Point, had not been proved.

Secondly, As to the Authorities; It is resolved in *Godall's Case*, that on a special Verdict, the Court will never doubt further than the Jury have doubted; the same Rule is laid down, *Hob. 55, 262. Cro. Car. 458. 2 Roll. Abr. 698.*

In the Case of *Fairchild and Gaire*, in an Action of Trespass, the Jury doubted whether a Surrender of a Donative Rectory to the Donor was legally good or not, and do not find that the Donor had accepted such a Surrender; yet because the Jury's Doubt was, whether the Surrender was good, and if the Surrender was good, they found for the Plaintiff, the Court held, that such Acceptance shall be intended, and yet the Plaintiff had no Title, unless such Surrender was accepted.

In Ejectment, *Castle and Hobbs*, the Jury find no Title in the Plaintiff, but found that *Hen. 8.* was seized and conveyed to the Defendant by Patent, which they set out in *hac verba*, and pray the Discretion of the Court, touching that Patent: The Court adjudged it a void Patent; it was objected that there being no Title found for the Plaintiff, he could not recover; but 'twas resolved by the Court, that the sole Question being, Whether the Patent was void, they would intend, the Plaintiff had Title, if the Patent was void, because the Jury had declared the Defendant guilty, if that Patent was illegal.

In Ejectment, a Will is found, wherein the Testator devises several Rents to his Children, in several Writings, under his Hand and Seal, and that his Heir should enjoy in Case of Payment, and in Case of Non-Payment, devises over. *John* his Son and Heir paid, who left *Edward* who conveyed to *Bridget* the Lessor of the Plaintiff for Life; there were several Questions put to the Court by the Jury, *viz.* Whether the Will was good, or the Entry of the Devisees lawful without Demand? But it was objected, that the Life of *Bridget*, Lessor of the Plaintiff, was not found, so that the Plaintiff had no Title found, but it being on a Special Verdict the Court intended, she was alive.

Cro. Jac. 41.
Molineaux
against
Molineaux.

There is a Resolution of the same Nature in *Moor* 267, 268. *Cro. El.* 238. *viz.*

Allen *versus* Hill.

IN Ejectment, special Verdict was found, that an Estate for Life was devised to *Agnes*, on Condition, that if she departed clearly out of *London* and dwell in the Country, she should have a Rent, &c. They find that she *totaliter* departed from *London*, and went to *Milton* in *Suffolk*, and after, the Heir before Entry, and the Executor, release to *Agnes*, and afterwards the Heir entered; Question was, Whether this Release was good, which depended on this Point of Law? Whether after the Condition was broken, the Estate was divested before an Entry? For if so, she was Tenant at Sufferance, and the Release would not enure by Way of Enlargement of her Estate. The Judges resolved, she was only Tenant at Sufferance; 'twas then objected, that the Verdict was insufficient, for the Condition does not appear to have been broken, for it was not found that she dwelt in the Country; but the Court was of Opinion, that it must be intended she did dwell in the Country, and consequently, that the Condition was broke, because the only Point the Jury doubted of was, whether the Estate for Life was divested out of her without Entry, and whether she had such an Estate, as a Release would operate upon.

Note, This Case seems to have been only cited in arguing the foregoing Case.

But it has been objected, that the Seisin of the Devisor, and his dying seized, can't be by Intendment, and for this, the Case of *Plumer* and *Whitcot*, which has been reported in 1 *Vent.* 314. 2 *Mod.* 119. but much better in 2 *Lev.* 158. and 2 *Jones*, 60.

Vid. Cro. El. 238-9. That this Case is an Authority to the Purpose, for which it is cited here, but the right Point is not taken.

The Case is this: An Action of Debt is brought against Sir *Jeremy Whitcot*, as Guardian of the *Fleet* in Fee, for the Escape of *Holt*, in Execution for 2000 *l.* at the Plaintiff's Suit, out of the Custody of *Duckenfield*; to whom Sir *Jeremy* had granted that Office for his own, and two other Lives: On *nihil debet*, a Special Verdict was found, That Sir *Jeremy* was seized in Fee of the Office, and made a Grant for three Lives to *Duckenfield*; that *Holt* and divers others in Execution for great Debts, did escape out of the Custody of *Duckenfield*; and that he being a Man of desperate Circumstances, suffered them to escape, and went with them; and that *Duckenfield*, at the Time of the Grant and the Commitment of *Holt*, and of his Escape, was insufficient; and the Question referred was, Whether *Jeremy Whitcot* the Defendant, on the

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Statute

Statute of *West. 2. quod Respondeat Superior*, should be obliged to answer this Debt? And this having been several Times argued at the Bar, *Wild* from the Bench took an Exception, that the Verdict was insufficiently found, because it did not find *Duckenfield* insufficient at the Time of the Action brought; and on that Exception, a *venire fac' de novo* was awarded.

But this Case, which I admit to be Law, does not impugn the Doctrine I have laid down; for in this Case there was not a sufficient finding, but it comes within the second Branch of the Distinction. For here is not sufficient found to bring the Matter of Law in Judgment before the Court; for the Action being on the Statute of *West. 2. Cap. 11.* which says, *Si Custos Gaolæ non habet per quod Justicietur, vel unde solvat Respondeat Superior*: So that the Gift of the Fact, from whence the Point of Law did arise, is the Insufficiency of the inferior Gaoler at the Time of the Action brought, for otherwise no Action lay against the Superior. So that the very Fact is not found that brings the Question touching the Law before the Court; but this no Way contradicts the Rule already mentioned, touching Special Verdicts, nor in the least influences the Resolution of this Court. For here all Facts are found that create any Doubt, touching the Legality of the Will, and therefore the Court can't receive any Doubt on any Thing that is the Matter found, as touching the Devisors being seized, or dying seized.

^{2 Ro. Ab. 699.} So is the Case in *Ro. Ab. Tit. Tryal in Ejectment*. The Jury find a special Verdict. The *J. S.* was seized of the Mannor of *D.* in his Demesne, as of Fee; in which Mannor there was a Copy-holder, who did waste, by cutting an Oak; and that *J. S.* the Lessor of the Plaintiff, being his Cousin and Heir, entered on the Place where, &c. for the Forfeiture, and was seized in his Demesne, as of Fee, and conclude *si super totam materiam*, he had Title; they find the Defendant, Guilty; if not, they find him Not Guilty. This was judged to be an imperfect Verdict, because here is no especial Doubt left to the Court; but the Court must Judge upon the whole Title; and if *J. S.* had aliened, the Forfeiture had been dispensed with: And if the Lessor of the Plaintiff had repurchased from the Alienee, he would have no Estate, by Reason of the Forfeiture, though he had been Cousin and Heir to *J. S.* so that the very Gift of the Plaintiff's Title in this Case, is the Continuance of the Seisin of *J. S.* and the Discent of the Manor to the Lessor of the Plaintiff.

So in the same Page, *Pl. 11.* in Ejectment, by the Lessee of the College: The Jury find a special Verdict, that the College made a Lease to *A.* upon Condition, and find a special Matter in Law, where the Condition was broken, and find that the Bailiff entered and leased to the Plaintiffs, and did not find that the Bailiff had any Deed from the College. This is an imperfect Verdict, for here likewise the Jury doubted *super totam materiam*; and the very Gift of the Action is, Whether the Condition is broken or not; which Condition giving the Plaintiff a Right of Entry, it can never appear to the Court that there was any Breach, unless there be an Entry for that Condition; and a Corporation

tion can't make a Bailiff without a Deed, and therefore the Bailiff without a Deed, can't enter for the Condition broken.

And the same Rule holds likewise in the Case of *Gimblet and Sands*, in *Cro. Car. 391.* Ejectment, where a special Verdict was found, that *Humphry Martin* was seized in Fee, and made a Settlement to the Use of himself for Life; and then to his Wife for Life; and then to his Son *John Martin*, and the Heirs of his Body lawfully begotten: And afterwards, *Humphry Martin* enfeoffed *John Smith* with Warranty, who enfeoffed *Smith* with Warranty, who enfeoffed *Baskervill*, the Lessor of the Plaintiff. *John Martin* was the only Son of *Humphry* by that Marriage, & *super totam materiam*, if the Plaintiff had Title. They found for the Plaintiff. Now here the Court would not intend *John Martin* to be Heir, for that is the very Gift of the Fact, and is absolutely necessary to bring the Doubt before the Court. For if *Humphry* had a Son by a former Wife, then the collateral Warranty would not descend upon *John* to bar him.

So that this is the Question of Fact left undetermined by the Jury, which is perfectly necessary to form the Resolution of Law thereupon, and being not found, it is an imperfect Verdict; for it does not settle such a Fact as the Court can determine a Matter of Law upon.

But in this Case every Thing is settled to resolve our Doubt, whether the Will be legally executed or not, for the Doubt is not touching the Title of *Jennings* the Devisor to make the Will, but whether he has actually made an effectual Will within the Statute, by executing it in the Manner they have found; and therefore the Seisin, or dying seized of the Devisor is out of the Case.

We come now to the second Point, *viz.* Whether this be a good ^{2d Point.} Will, according to the Solemnities required by the Statute of Frauds and Perjuries: The Words are: "And be it further enacted by the Authority aforesaid, that from and after the said Feast Day of the Nativity of *John the Baptist*, 1696, all Devises and Bequests of any ^{7° Gulielmi.} Lands, Tenements, or Hereditaments, devisable, either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor, by three or more credible Witnesses, or else shall be void and of none Effect."

The better to consider this Matter, we will consider what was the Inconvenience the Statute design'd to prevent; and for this I would look back, to know how the Law stood before the Statute, and then consider the Solemnities the Statute has added.

At Common Law there was no such Thing as a Will of Lands; and in this, the Rule of Property of these Kingdoms) which as *Coke* says in his first Institute, was *feudall*, and not *allodiall*) agrees with all the foreign Feudists, *Lib. 1. Feudorum Title, & Filius succedent Filii, vel nepotes ex Filio nulla Ordinatione defuncti in feodo manente vel alente, & Golo fridus Gloss.* And all the Feudists agree, that there could be no Legacy ^{This Bolt seems awry. See Saxon Laws Doomf-day-Book, contra.} nor

nor Testament of them; and the Reason is the same in their and our Law; for all feudal Lands pass by Feoffment, with Livery of Seisin, which they called Investiture, and was done in a solemn Manner in the County; and the Heir coming in by the Words of the Feoffment, it prevented all Dispositions by Devise, and in the *Feudum Nobile*, or Knights-Service Tenure, the Body and Lands of the Heir was in Ward to the feudal Lord, for his Education to Arms, and therefore no Disposition by Will was admitted to his Prejudice.

That which altered this Law first in *England*, was the Feoffment, to Uses which were first invented to elude the Statute of *Mortmain*, and then applied to several other Purposes; and when they distinguished the Use from the Propriety, they resolved, That the Use was devisable, as we see *Bro. Feoffment, to Uses, 337. 1 C. 123.* But when the Statute 27 *H. 8.* in *England*, had transferred Uses into Possession, there arose this Inconvenience, that Persons by their Wills could not provide for their Children or Relations; and therefore the Statute 32 *H. 8. C. 8.* was made, which is derived hither by 10 *Car. 1.* and by that Statute, a Man had Liberty to dispose by Will in Writing of all his Soccage Lands, and two thirds of his Knights-Service Lands; and by this Statute, no particular Solemnity is required in the Making such Will, but the Writing only.

There were several other Lands in Boroughs, which by the Custom of the Borough, were devisable by Nuncupative Wills only, and this before the Conquest seems to be the general Rule; and the Gavelkind Lands, which did very much partake of the *allodial* Quality, was likewise devisable by the Custom; but there was no particular Solemnities required in making such Wills; therefore Sir *Thomas Smith*, who was a good Civilian, and lived in *Q. Elizabeth's* Time, in *Republica Angliae, Cap. 12.* takes Notice, that our Wills were not subject to the Solemnities of the Civil Law, but made with all Liberty and as Freedom in *Jure Militari*:

Now the *Roman* Military Testament was made *in procinctu*, and was a Favour allowed to the Soldiers in the War, to devise, either by Word or Writing, without the Solemnity of Witnesses; and with us there being no Solemnity required but that of Writing, which was by the 32 *H. 8.* the Testaments were construed *secundum jus gentium*, and the Military *Roman* Testament being that which was most free from all Ceremony and Solemnity, therefore they construed that our Wills might be made after the same Method.

Hence it came to pass that a Nuncupative Will was good for Chattels till this Statute; and where the Lands were Testamentary, as they were according to the Custom of (some) Boroughs, they allowed a Nuncupative Will to pass them; and even since the Statute, if the Will be made of Goods, and written in the Party's own Hand, without any Witnesses at all, it is allowed to be good; but it is not a nuncupative, but a written Will, and the Statute does not require any Witnesses to Chattels only.

But there were many Inconveniencies found after this Statute of *H. 8.* for Men would set up Papers that were not signed by the Deceased, and would get Witnesses to swear to the Publication of it; and this was

easily

easily construed, since there was no Solemnities required at the Publication of it.

2. If any Preparation was made for a Will, they would get Witnesses after the Decease of the Party, to swear to the Publication of it; and often old dormant Wills were set up, and the latest Wills were smothered by such Contrivances.

3. In Boroughs where nuncupative Wills were allowed, it occasioned much Perjury, by swearing to Words that were never spoken.

To prevent these Inconveniencies, was the Clause in the Statute of Frauds and Perjuries, which was 29 *Car.* 2. (and add here the 7 *W.* 3.) I have heard that this Statute, and that of Intestates, were drawn up by Chief Justice *Hale* and the Judge of the Prerogative Courts; and there are many Things in them that were according to the Plan of the Civil Law, and I have observed Constructions have been accordingly.

There are by this Statute three Solemnities required to the Making of Wills that pass Lands.

First, That it should be in Writing: For the first Statute touching Wills, requires it should be in Writing, yet the Lands devisable by Custom, were not comprehended in the first Statute.

Secondly, That it should be signed by the Party, and this Ceremony was chosen rather than sealing and delivering, which was the Solemnity required in Deeds, because the Seal, which was formerly a great Mark of Distinction in Families, was then much disused, and Men sealed with any Seal, and not with the Family Seal; and so the Ceremony of the signing, used by the Civil Law, was rather chosen than our Ceremony of executing Deeds; and the Delivery was not made necessary, because this would not discover any Fraud; the signing is to be by the Party himself, or by some other Person by his Direction in his Presence. The latter Part of the Clause is in Favour of such Persons, who by some Accident lost their Hands, or were paralitick and diseased, and could not use them.

Thirdly, The third Solemnity is the Attestation by the Subscription of three Witnesses, in the Presence of the Testator; and here the Statute pursues the Method of the Civil Law in *Testamentis Solemnibus*; not as laid down in *Justinian's* Institutions, but as reformed by the Code in the Novels: The Civil Law required, that the Witnesses should sign the Will, and that in Presence of the Testator. The Design was, That the Will may appear to be compleat, and not a Preparation only; for by taking the Names of the Witnesses to his Paper, the Testator has shewn that he has compleated his Will; and it was required, that he should take the Witnesses Names in his Presence, as an Admonition; that the Names of Witnesses were necessary, that so the Parties concerned in the Will, might have resort to them after his Death.

As to the Number of Witnesses, seven were required by the Institutions, in the *Cap. de Testamentis ordinandis*; but this was relaxed by three, by the Constitution of *Leo* in the *Novellæ*, in *Favorem eorum qui ruri & locis infrequentibus Inhabitant*; and whereas the Institutes required they all should be present, *uno eodumque tempore*, the Code re-

laxed it in Case of Persons that had infectious Diseases, and so 'tis not required with us, that all the Witnesses should be present at one and the same Time. For the *Romans* who had once this Ceremony, and were very curious in the making of their Wills, thought fit to relax it afterwards ; and so when this Statute was made on the Model of the Civil Law, they omitted the Ceremony which the Civil Law had remitted. I am therefore of Opinion, that it is not necessary that all the Witnesses should subscribe together and at the same Time, because by the Words of the Statute, they are only to attest the Will in Writing, and the Signing of the Testator, that is what they attest and are Witnesses to ; and they are no Witnesses to their own Attestation ; so if they do not attest the same Writing, as if two are Witnesses to the Will, and one to the Codicil, that confirms the Will ; this is not sufficient, because there are not three Witnesses to that Writing that is the Will. So if it be signed in the Presence of one, and published in the Presence of two others, this is not sufficient, because it is the Writing and Signing of that Will that is the Solemnity necessary to be attested ; but they are not to bear Witness to the Subscription of each other, because the Statute does not say, that they shall subscribe together at one and the same Time, and Nobody can add a new Circumstance or Solemnity which is not required by the Statute. 'Twas easy for the Statute to have said, that the Witnesses shall subscribe at one and the same Time, or that they shall subscribe altogether, and in the Presence of the Testator ; or to have said, that they should attest the Writing, which is the Will, and the signing of the Testator ; and I can't by Construction add new Solemnity not mentioned in the Statute ; for this is to make a new Law, and not to expound that already made.

If this were Doctrine, if one of the Witnesses signed his Name in the Presence of the Testator, but went out of the Room while the other Witnesses were signing, the Will should be void ; and to make this Construction, would overturn many Wills that have been made in this Manner.

No Man will say, That if one Man proves the Sealing of a Deed at one Time, and another the Delivery at another Time, that the Deed is not well proved, and yet the Law requires at least two credible Witnesses to the Sealing and Delivery, why then may not a Witness prove the Signing at one Time ? If *Juncta Juvant* be a Rule that will hold in a Deed, why not in a Will ? Nay, it is stronger in a Will, because the two Witnesses saw the precedent Signing of the Testator, and the precedent Subscription of the other Witnesses ; and the rather, because it appears that the *animus testandi* of the Testator continues in both his Acts of Signing.

We are now come to the Authorities. The first is in *Chan. Ca. 109.* where 'tis resolved, That a Will of Lands attested by three Witnesses, who at several Times subscribed their Names at the Request of the Testator, but were not present at once together, is a good Will within the Statute.

It has been objected that this is a Resolution in Chancery, but no Authority in a Court of Law ; but I think a solid Answer is given, that there

is the same Rule of Property in Equity as in the Laws, and the same Constructions on the Statute Law ; and the rather, because it is a Statute for preventing of Frauds, which is the proper Business and Jurisdiction of a Court of Equity to suppress.

The next Case is *Libbe and Lee*, reported in 3 *Mod.* 262. *Show.* 68. I have seen a much better Report by the learned and excellent Lawyer Mr. Serjeant *Broderick*, and is thus :

In Ejectment the Jury find a special Verdict, that *Thomas Denham* was seized in Fee, and the 21st of *January*, 1678, made his Will in Writing, and thereby devised the Lands in the Declaration to be sold for the Payment of his Debts, which he subscribed in the Presence of two Witnesses, and afterwards made a *Codicil*, by which he confirms the said Will in all Particulars, not altered by the *Codicil*, and the Lands in Question were not mentioned in the *Codicil*, and declares the *Codicil* to be Part of his Will, and that the *Codicil* was witnessed by two Witnesses, whereof one was Witness to the Will ; and the Question was, Whether this was a good Will within the Statute ? And adjudged that it was, because the Writing, that is the Will, must be signed by the Party, and subscribed by the Witnesses, who must attest that very Writing that is the Will. For the Statute makes it necessary that they should attest the Will, and the signing of the Party. For if a Man makes a *Codicil* confirming his Will, which is not signed by himself, and subscribed by three Witnesses, the *Codicil* could not operate to confirm that Will : For there is a Nullity 'till it received its Perfection by the Testator's signing, and three Witnesses subscribed, and being such, could not be confirmed by any subsequent Act ; and if such a Will be a Nullity because it is not signed by the Testator, and attested by three Witnesses, it is as much a Nullity, though it be signed by the Testator and two Witnesses, because by the Statute, the third is as necessary to compleat the Will as all the rest.

In the Report of Mr. Serjeant *Broderick*, this Case is put by Chief Justice *Holt*, Whether a Will is signed in the Presence of two Witnesses, and then the signing owned to be his Hand in the Presence of a third, and subscribed by each of them in his Presence, be a good Will or not ? He himself doubted of it ; but Mr. Justice *Dolben* said it was a good Will : For the Testator owning his Hand was a signing, and no new Writing by the Testator was necessary ; but the only Doubt there was, Whether the Testator should not sign it over again in the Presence of the third Person, to fulfil the Letter of the Statute ? For it seems to be admitted of both Hands, that if the Testator had signed it over again in the Presence of the third Witness, that Will would have been good, though the three Witnesses were not altogether, and did not subscribe in each others Presence.

It has been objected, That this Way of executing Wills may create great Perplexities. For if a Man should execute his Will, and afterwards purchase an Estate, and afterwards sign it in the Presence of two other Witnesses, the Question is, Whether such Estate, which would be out of Dispute if the Will is executed altogether, would pass ?

But there is no Question but such Estate would not pass by such Will, because it is not a Will to pass Lands, unless it be executed in

the Presence of three Witnesses, after such Estate purchased ; and if it were signed in the Presence of three before the Purchase, and afterwards signed in the Presence of two only, it would be void, *quoad* those Lands.

Another Objection has been made, that the Intention of the Statute was, that three Witnesses to the Will might likewise attest the Sanity, and so a Will executed in the Manner in this Verdict is not effectual : For, say they, if a Will was executed before two Witnesses, and the Man was of sound Memory, and afterwards he becomes *non compos*, and signs it before a third.

Now if such a third signing by one Witness should make the Will effectual, the Sanity of the Person would turn upon the Credit of a single Witness.

But I don't think the Statute appointed three Witnesses, meerly and principally to attest the Sanity of the Person ; for a Man must be *compos mentis* upon the Execution of a Deed, as well as a Will executed, and yet three Witnesses are not required to the Execution of a Deed ; but the Design of the Statute was to prevent Fraud in setting up of a Will that the Testator had not really made.

But if the principal Design of the Statute had been that they should attest the Sanity of the Testator, I don't see but the Attestation might be made by the Witnesses signing at three several Times, as well as signing all at once : For if they say that at those Times the Testator appears a Man of Understanding, and that his Capacity was continuing 'till signed ; it will be a most effectual Testimony in Behalf of the Will.

Indeed if any of the Witnesses swear that he was *non sane Memoriae*, it will overthrow the Will, where the signing is at different Times ; so it will if any one of the Witnesses should deny their Hands ; therefore Nobody can doubt but that it is the better Way, they should sign altogether ; but because there is a Convenience in their signing altogether, I can't from thence judge it to be necessary, unless the Statute had absolutely required it.

Again, If it were signed at three several Times, and the last Witness should say he was *sane*, and others attest the contrary, there the Question would be, Whether he was a credible Witness or not ? For it must be signed in the Presence of three credible Witnesses ; and as far as any Persons of equal or better Credit do counterpose his Evidence, so far he is not credible ; but if his Credit stand unimpeached, though he stands singly, I don't see why he should not be a competent Witness of Sanity, as well in the Case of a Will as of a Deed ; if there were three Witnesses that were all present at the same Time, yet 'twould not be uncontrollable Evidence of his Sanity ; for the Statute did not design to make three Witnesses conclusive, because it says, it must be three credible Witnesses ; and so the Heir at Law who is to be disinherited, may examine Counter-Testimony against them ; and in the same Manner he may, where 'tis executed at several Times. Nay, the Heir has a greater Advantage, because he may more easily invalidate the Testimony of any single Witness, when it is not corroborated by the concurrent Testimony of his Fellow-Witnesses ; but it is no Reason to damn this Manner of executing

cutting Wills, because the Heir has thereby a greater Advantage in contesting the Proof of them.

But though this be a good Execution of a Will to pass Lands, where the Testator signs in the Presence of one Witness, and afterwards in the Presence of two, yet it is the safest Way to execute the Will in the Presence of all the three Witnesses ; for there may be great Difficulty in the Proof, where the Testator signs, and the Witnesses subscribe separately ; for if the Witness who subscribed by himself should die, I don't see how the Will could be proved ; for the Proof of the Hand can't be admitted where there are living Witnesses to the Will ; and these can't prove the Subscription of the third Witness who is dead. But because such Will thus incautiously executed, may in some Cases fail in Proof, yet it is no Reason to damn such Wills, where the Witnesses are living, and prove the signing of the Testator : And it is no Consequence, that because in some Cases there may be a Failure of Proof, therefore we should destroy a Will that is sufficiently proved.

In this Case, the Will was signed by the Testator, in the Presence of the first Witness, who likewise signed in the Testator's Presence, and the Testator signed in the Presence of the last Witnesses, who also subscribed in his Presence.

This is all the Solemnity required by the Statute ; and if any more had been required, it would have been specified in the Statute ; and I can't erect a new Solemnity to destroy a Will for which I have no Authority from the Statute. And so Judgment for the Plaintiff.

The End of the Exchequer Cases in Ireland.

T H E
R E P O R T
Of a Case Heard and Adjudged in
the King's Bench in *Ireland*.
Tempore GEORGE II I^{mi}.

Dominus Rex *versus* Dwyer.

DWYER was Indicted for Murder and on the Statute of Stabbing ; and on each Indictment a special Verdict was found, *viz.* That on the 17th of *January*, 1724, *Dwyer* met *Thomas Ross*, deceased, on *Essex* Bridge, with his Wife and two Children, that *Dwyer* jostled one of the Children with his Horse he rode upon ; that *Ross* coming up to *Dwyer*, and having hold of his Bridle, seized him ; that *Dwyer* immediately drew his Sword and wounded *Ross*, and lighted down ; that *Margaret*, *Ross*'s Wife, interposed to prevent further Mischief, saying, she had rather he would abuse her than her Husband ; that *Dwyer* then returned to his Horse, and the Sword wanting the Scabbard, one of the Crowd reached it towards him, and the said *Margaret* snatched the Scabbard and broke it, and threw it at *Dwyer* ; *Dwyer* then mounted his Horse and sheathed his Sword, and other angry Words then passing between *Ross* and *Dwyer*, *Dwyer* in a Passion dismounted again, and returns to *Ross* with his drawn Sword in his Hand ; and that *Ross* endeavoured to seize somebody's Stick, as well to defend himself as to offend *Dwyer*, but that he could not ; that *Dwyer* with his Sword lifted up, attacked *Ross*, assaulted and beat him with it ; that *Ross* and *Dwyer* closed, and mutually gave and received several Blows ; in which Scuffle *Dwyer* stabb'd *Ross* with his Sword on the left Pap, an Inch wide, and three Inches deep, of which he died.

To consider this Case, we must settle the Difference between Murder and Manslaughter, and whether, as this Case is circumstanced, it belongs to the one or the other Species of Crimes.

By the antient *Saxon* Laws, all Crimes were capable of Compensation by pecuniary Payments ; for they thought that under the Christian Institution, no Person ought to die for any Offence ; and therefore the Laws of King *Ina*, which are the first we have in *Lambard's Code of Saxon*

Lambard 5, 6.

Saxon Laws, appoint proper Penalties. But no Compensation was for a malicious Murder.

The Laws of King *Alfred* began with a Preface, reciting the several *Mosaick* Institutions, and expressly after mentioning, that the Christian Law was more mild; the Words are, *Ubi vero propagato Dei Evangelio plurimæ Nationes, atque adeo Angli verbo Dei Fidem adjunxerant, nonnullum per Orbem Terrarum Cœtus, atque etiam in Anglia Episcoporum & aliorum clarissimorum sapientiorum conventus agebantur, atque hi Divina Edocti miserationi cuique jam primum pecanti pœnam imparabant pecuniariam ejusque (absque omni Divinæ offensionis cocitatione exigendæ minus) Magistratibus (data prius venia) deferebant; proditori tantummodo ac Domini desertori hanc mitiorem pœnam haud infligendam existimarunt tum quippe qui ejusmodi vice minime parcendum censuerunt, tum quod Deus contemptores sui omnia miseratione indigens vetuit (indignos voluit) tum quod Christus illorum qui ei mortem obtulerunt non omnia misertus: Dominum vero præ ceteris colendū statuit.*

By this appears, that the Law which mentions *de proditione Dominorum*, in which there is appointed an Estimate for the King's Head, and the Heads of other Lords; and the Penalty of Death, in Case it were not paid, was in those Times thought a new Punishment, which they did not think fit to inflict for heinous Offences, as High-Treason against their Prince, and Petty-Treason against their Lords, without making a Preface to reconcile such Proceedings to the Law of God.

*Julius Clans
Sententia, lib.
529.*

But to punish Theft or other Crimes with Death, was esteemed directly opposite to the Religious Opinions of those Times, as appears by what the Canonists have observed on the Laws of *Fredrick* the Emperor, who established, that a Thief that stole five Shillings should be hanged. *Proles Fredrici Imperatoris qui statuit in illa lege quod fur quinque solidorum suspenderetur, et sic quod homo ad Dei imaginem creatus propter bona occideretur, & alij Regis Successores qui secuti sunt hanc legem eorumque ministri non regnaverunt super terram & male vitam finierunt nec Generatio eorum ad tertium gradum pervenit.*

*Life of Al-
fred, 109.*

But in *Alfred's* Law, in the Text *de Homicidio*, it appears that only a pecuniary Punishment was appointed for that Offence, and in those Times was levied only by Imprisonment, unless in the Case before-mentioned of High-Treason and Petty-Treason, where the Non-payment was punished with Death. 'Tis not very hard to conceive how the Kingdom was maintained by pecuniary Mulcts only; for in those Days, every Man was put in the *Decenna*, and if he was found wandering but three Days out of the *Decennary*, he was taken up and imprisoned, and he was presently to abjure the Kingdom, or else he lay at the Mercy of every one that would lay Hands on him. And if any Offence was committed in any of the *Decennaries*, if the Party was brought to answer, he was obliged to pay his Fine for the Offence, or he was imprisoned for ever. If he fled, the Tything was answerable for his Mulct or Fine to the King; so that by this Discipline, Men were put under a Necessity of being Innocent, or paying a grievous Fine, or being totally deprived of the Conversation of Mankind. And the laying the Fine on the Tything in Case the Offender fled, made it the Interest of every Man to bring the Offender to Light, and made it exceeding difficult

difficult to conceal a Theft or a Murder. And these Fines set by Law were the *Vite Majores*; for the Party was taken and imprisoned, and not to be set at Liberty without paying these Fines for his Redemption, which were therefore called a Ransom. But the pecuniary Punishments (*et ex Natæ*) on Offences, were called, *Vite Minores*, or Amerciaments, or *Misericordiæ*, because they were referred to the Mercy of the Court, and not imposed by precise Laws; but these becoming afterwards exorbitant, were assessed *per judicium parium*. And though the Fines are now imposed arbitrarily, yet being imposed by the Court, they are supposed to be according to the Law and Precedents in the like Case. Q.

Thus stood the Law till the Time of *Canutus*, who, as *Lambard* gives an Account, constituted a particular Species of Crimes, viz. he who insiduously killed a Dane by lying in Wait, should not pay any Price, but was certainly to die, unless he defended himself by his Ordeal, &c. *Murdra quidem Inventa fuerunt & Constituta in diebus Canuti, Dani Regis, qui post acquisitionem, Angliam & Pacificatam, rogatu Baronum Anglor' remisit in Daciam exercitum suum; ipsi vero Barones extiterunt fide jussores erga Regem, quatenus quotquot in terra secum retineret, firmam pacem per omnia haberent: Veruntamen si quis Angl' aliquem eor' interficeret, si se super hoc defendere non posset judicio Dei, scil' aqua & igni de eo fieret Justitia; si autem ansugeret solveretur ut supra dictum est.* The Fine by the foregoing Law, was forty six Marks, of which the King had forty, and the Relations of the Deceased the Residue, if the Murderer could not be brought to Justice. See *Lambard LL. Edwardi Conf. No. 16.*

Bracton gives the same Account of the Original of this Species of Crime, *Lib. 3. de Corona Capite 15. Fol. 136.* And it appears that *William the Conqueror* revived this Law for the Security of his Frenchmen, as appears by the Laws of *William the Conqueror, Law 53. Fol. 170.* and by the Law of *H. 1. Law 75. Page 205.* and it seems from the Time of *Canutus*, the Law began to inflict capital Punishments. *Canutus Laws No. 61. Sane quidem Tectorum excisiones & incendia aparte Compilationes, cædes manifestæ, Dominorumque proditioes scelera sunt jure humane in expiabilia.* So that now they began to admit the Distinction between Crimes expiable *Jure Divino*, which all Crimes how heinous soever are, and Crimes expiable *Jure Humano*. The not attending to this Distinction, was the Original of imposing pecuniary Mulcts in their former Laws; and henceforward they began to think it no Offence against Christianity to inflict capital Punishments for some Offences; howbeit in the Case of Theft, there was great Latitude left in the Punishment, even to *Bracton's* Time, viz. *pro parvo enim latrocinio, vel pro parvo re nullus Christianus morti tradendum, sed alio modo, sic Castigatur ne facilitatis veniæ aliis præbeat materiam delinquendi, & ne maleficia maneat impunita, et ideo secundum rei qualitatem furatæ, & valorem si fur convictus fuerit, vel morti tradatur, aut Regnum abjurat, vel patriam, Comitatus, Burgum, vel villam, aut Castigetur, & sic Castigatus dimittatur.* Ibid. No. 15.

In the intermediate Times of *William I.* it appears that the Offence of Theft was punished with a pecuniary Mulct only; and indeed it seems that as long as the *Decennary* Law continued in its full Force, there

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there seemed no Necessity of punishing Theft with Death, because there was no Means of concealing the Things that were stolen: But when, by the Innundation of People, the *Decemaries* were dissolved, it was necessary, in Case of Theft, to proceed to greater Severities. And as the Law of Murder began in *Canutus*, so also now the Distinction began between Murder and Manslaughter. The Law runs thus:

Si quis alium premeditatus trucidarit palam perempti cognatorum in potestatem dator; sin cædis infimuletur tantummodo, atque in Excusatione afferenda ceciderit Episcopum penes esto ejus rei judicium.

Leges Canuti
53.

Hence it came to pass, that the Laws relating to Homicide were reduced into Form by the Clergy, and constituted on the Plan of the *Mosaick Law*; for the Clergy still taught that the Life of a Man could not be justly taken away, but as warranted by the Laws of God; and therefore the Law of *Deuteronomy*, *Cap. 19.* became the Pattern of our Laws in the Case of Manslaughter.

Leges Canuti
53.

Hence it is, that in this Law of *Canutus*, in Case of apparent Homicide, the Murderer was put in the Power of the Relations of the Deceased, and from hence the Appeal still continues to the next of Kin, who was the Avenger of Blood according to the *Jewish Law*.

Selden de Jure
naturali, 484.

From hence also came the Resolution, that the Avenger of Blood must make fresh Pursuit after the Offender, and it was a good Plea, in Abatement to the Appeal, that the Heir had not made fresh Pursuit, which was plainly according to the *Mosaick Pattern*, which permits the Avenger of Blood to pursue the Offender, and to slay him if he overtook him, before he got to the City of Refuge. *Deut. Cap. 19.*

But with us the Avenger of Blood was not permitted to carve out his own Revenge as with them, because that Part of the Institution which permits the Avenger of Blood to slay the Offender, *Lex Tallionis*, was thought to be merely political, and permitted to the *Jews* merely for the Hardness of their Hearts, and was therefore thought to be abrogated by the Christian Institution, which seems to have abolished the *Lex Tallionis*. *Matth. 5. Ver. 28. & sequentibus.*

Keeling 97, 8.

And by the Statute of *Gloucester*, *Cap. 9.* it is provided, they should not plead in Abatement the Want of fresh Suit, if it was commenced within the Year and the Day. From hence Murderers being negligently prosecuted by the Relations, the Statute of *H. 7. C. 1.* was made that they proceed at the King's Suit within the Year and Day, but then the *Au-terfoits* acquit or condemn'd should be no Bar to the Appeal.

From the *Mosaick Law* came likewise the Distinction between Murder and Manslaughter, though the Ecclesiastical Interpretation carried the Distinction much farther than the *Mosaick Law*; for by that, "who so killeth his Neighbour that he hated not of Time past, as when a Man goeth into a Wood, and the Helm of his Ax slippeth off and killeth his Neighbour there, he shall fly to the City of Refuge, that the Avenger of Blood may not slay him, inasmuch as he hated him not in Time past; but if any Man hate his Neighbour, and lye in Wait for him, and rise up against him, and smite him mortally that he die, and flieth into one of these Cities of Refuge, he was not to be received."

Indeed the *Jews* interpreted the Distinction that was made in these several Laws to be voluntary Homicide ; but by the Interpretation that was put upon this Law, by the Clergy in *England*, they distinguished it into Murder and Manslaughter ; and they deemed him to be a Murderer that in Times past had conceived Hatred against his Neighbour, and lain in wait for him ; and him only to be guilty of Manslaughter, who on a sudden Provocation had committed the Homicide. This intermediate Species of Offence is not taken Notice of in *Deuteronomy* ; for there the Examples are taken of the highest and lowest Offence ; the first from lying in wait, and preconceived Malice, and the other from killing a Man with the Helm of his Ax against his Will : But this killing on a sudden Provocation being not taken Notice of there, the Christian Clergy placed it with the mildest.

It appears likewise by the Laws of *Canutus*, that the Bishop was to judge of the Proof of the Fact, who in antient Times sat with the Sheriff or Earl of the County, in the Torn or Criminal Court ; and if they judged it to be Homicide, he took him into the Protection of the Church. *Leges Canonicæ*
401

But in the *Norman* Times, this Jurisdiction in the Temporal Courts was taken away from the Bishops, both by the Law of the Conqueror, and the Canon of *Toledo*, which ordains, That *His qui in sacris ordinibus Constituti sunt in judiciis sanguinis adjuvare non licet*. And from henceforward the Bishops did not preside over the Proofs in Criminal Cases in the Courts of Justice ; and then the Criminals began to fly to the Church as to a Sanctuary ; and there the Bishops having inquired into the Crime, if they thought it Homicide, they would not deliver him up ; if it was Murder, they sometimes delivered him up to the Secular Power, and this they vindicated upon the Pattern of the *Jewish* Law. And to prevent this, it was one of the Constitutions of *Clarendon*, that if any one flew to the Church, or any privileged Place, he must either come *ad standum recto vel quod cognoscat malefictum propter quod se teneat in Ecclesia* ; and if he did so, he had Liberty to abjure the Realm and go into Banishment. *Bracton* spends a whole Chapter to consider how this Law could be executed ; and whether, in Case they would not deliver up the Malefactor, they could enter the Church, or violate the Sanctuary ? And he determines they could not, because this was *horrible nefandum* ; But he says, that the Spiritual and the Temporal Power ought to aid each other ; and adds farther, that whoever carried Sustainance to the Offender, should be put out of the King's Protection. And thus the *Laicks* were brought under the King's Protection and the Civil Power, which punished all voluntary Murder with Death, and excepted the Involuntary, according to the true Sense of the *Jewish* Law.

After which, the Clergy challenged the Privilege not to be tried themselves by any Temporal Jurisdiction, and therefore the Punishment of Murder and Theft by Death were brought in by the King's Laws. *Leges Canonicæ*
401

The Ecclesiasticks challenged an Exemption from all Secular Power, even in Cases of High-Treason. Thus the *Quere* of the Canonist, *numq' clericus comittens crimen lese Majestatis possit puniri per principem aut*

aut judicem secularem cum sit temporaliter subditus ? Resp' de jure loquendi quod non ; Clericus enim non dicitur proprie comittens crimen lese Majestatis cum sit non vere subditus ; tamen de facto principes seculares plures servant' contrarium ; but he resolves the Clergy were to be degraded before they were punished (though it were High Treason) by the secular Arm. But

They came to this Temper in *England* ; that for Treason the Benefit of Clergy should not be allowed on the Canonists Notion, that they were not subject to the King ; and therefore in the Case of the Bishop of *Carlisle*, arraigned for Treason, this pretended Liberty of the Church was over-ruled by the Judges ; but in the Case of Murder, though 'twas to be punished by Death by the Laws of God, and the Flight of a Levite, to the City of Refuge, was not permitted, for the Mosaic Law had constituted the Cities of Refuge to be the Towns of the Levites, 'twas never to be abused for the Protection of a Murtherer, yet the Clergy claimed even in this Case an Exemption from the secular Laws.

But in all other Cases of Homicide and Theft, the Ecclesiastical Jurisdiction was readily allowed, and if they challenged any Ecclesiastical Person accused before the secular Judge of any of these Offences, he was delivered to the Ordinary, who was to judge *de corrigibilitate* ; and if he adjudged him corrigible, he appointed him a proper Penance, and after the Performance of such Penance, he was assail'd ; but if the Offender was judged incorrigible, he was degraded.

When this was settled, the Dispute arose, Who should be Judge ? and the Canonists say, *quod probatio & cognitio num aliquis sit clericus debet Ecclesiastica jurisdictionis debet fieri coram judice Ecclesiastico non coram judice seculari*, tho' in *Lindw. &c.* (which gives us many of our Institutions) 'tis said *clericus contra quem procedet judex secularis pro aliquo delicto exhibet coram ipso judice seculari jura sua & instrumenta & eis visis judex secularis illam remittet ad suum judicem ecclesiasticum ubi scil', &c.*

The Clergy extended this Privilege to all that had *primam tonsuram*, as the Clerk that set the Psalm, the Door-keeper, the Exorcist, the Subdeacon, the Reader ; and they being Judges who were Ecclesiasticks, it was thought proper to restrain them within Bounds, and therefore the Temporal and Ecclesiastical Power joined in making the Reading before the Secular and the Spiritual Judge, as the Test of their being Ecclesiasticks, since no Man could be presumed to be an Ecclesiastick, that could not read ; and therefore the reading was before the Secular Judge, but the Attestation that he could read, was by the Ordinary ; but before he was try'd whether he was an Ecclesiastick, he was try'd for the Fact, for if he was found guilty of Murther by Inquest, the Ordinary could not claim him, because, as has been said, all Ecclesiasticks in that Case suffered Death.

Anciently, when any Ecclesiastick was indicted or appealed of any Crime, under the Degree of Treason against the King, the Ordinary might challenge him ; but if the Ordinary did not challenge him, he was to be try'd as any other Temporal Person.

But the Statute of *West. 1 C. 2.* provides, that such Persons delivered to the Ordinary, should not be discharged without Purgation ; and this

was made by Articles, exhibited against the Offender, and his Answer to them in the Ecclesiastical Court; if he was found guilty of Murder in that Court, they degraded him; but if he was guilty of Homicide, he made his Purgation by Pennance, or Commutations for Money, as the Ordinary thought expedient.

But because by the Delivery to the Ordinary, the King lost the Forfeiture of his Goods and Chattels, and Profits of his Lands, an Inquest was taken to know *qualis ordinario deliberari debeat*. This created a great Mischief to the Prisoner, for if he submitted to plead, he could not be claimed by the Ordinary having subjected himself as a Layman to the Secular Jurisdiction; if he did not submit to plead he lost his Challenges to the Jury, and the Inquest of the Jury, though he had no Liberty to Challenge, past upon him, whereby his Goods and Chattels were forfeited.

Prisott, Chief Justice of the Common Pleas, in *Hen. VIth* Time, set ² *Inst.* 164 this on a better Foot, founding himself on the 25 *Edw. III. c. 4.* which says, that all Clerks, as well secular as religious, from henceforth convicted before the secular Justices, for other Treasons or Felonies then against the King, shall from henceforth freely have and enjoy the Privileges of Holy Church, and shall without Delay, be delivered up to the Ordinaries demanding them, so that he allowed them to plead to the Felony, and after Conviction, the Ordinary might demand them.

This introduced the Liberty for the Prisoner to demand his Clergy; and if on the Inquest, he was found guilty of Murther, the Court did not admit such Demand from the Prisoner, because he was to die by the Law of God; and therefore in such Case, the Court did not deliver him, unless the Ordinary did demand him, which in so heinous a Crime, was seldom done for Laymen, nor even for Clerks; but Cases of Homicide and Theft, were looked upon as properly corrigible by the Ordinary, because they were not guilty of Death by the Law of God, and therefore they allowed any Person of Education that could read, the Benefit of Clergy, and the Ordinary received such Persons to Corrections and Purgations by Money, because they were not Offences, which by the Mosaick Constitutions were punished by Death.

But the meaner Persons not educated in Learning, and that had no Money to make Commutation, were generally given up to the Temporal Law.

There were several intermediate Statutes, by which they endeavour'd to abridge this Privilege of the Clergy; the first was *de Bigamis*, which was, that the Bishop of *Rome* having made a Constitution, that all Persons twice married, should be excluded from Clerks Privilege, that such Persons when convicted, should not be delivered as Clerks, whether they were Bigamists before or after such Constitution; so that after this Statute, when Felons arraigned, challenged their Clergy, the Prosecutors, upon shewing that they were Bigamists, ousted them of this Privilege. To defeat the Effect of this Statute, they procured another, that Bigamy should be tried by the Bishop, and not by the Temporal Law.

The Statutes of *Clarendon* that forbid the taking Sanctuary, whereby to avoid the secular Justice, were also enervated by *Articuli Cleri*; for *Cap. 15.* if a Clerk fly to the Sanctuary, he should not be compelled to abjure the Realm; so that the Churches and Privileged Places continued a Sanctuary for the Clerks themselves.

It has been likewise resolved, that if a Clerk had confessed the Felony, and became an Approver, he should not be delivered to the Ordinary, because by such Confession, he had submitted to the secular Jurisdiction.

But the Ecclesiasticks pretended such Confessions were *Coram non iudice*, though it had been otherwise resolved in the Temporal Courts, as my Lord *Coke* observes; but the Statute of *Articuli Cleri, Cap. 16.* enacts that he shall enjoy his Privilege, notwithstanding his Confession.

And now the Law amongst Ecclesiasticks stood on this threefold Distinction.

First, If a Clerk was convicted of Treason, he was never delivered to the Ordinary, for that would have given up the Prerogative of the King.

Secondly, In the Case of Murder, he was delivered to the Ordinary, if demanded, but then it was in Order to be degraded, and for no other Purpose; for in a Crime punished by the Law of God with Death, he was not permitted to make any Purgation, but such Degradation was taken to be in Nature of the Death and Destruction of the Clerk, and therefore he was not put to Death; they did not intend he should be twice punished for the same Offence; and *Bracton* says, *Clericus, si de crimine convictus degradatur non sequitur alia pana pro uno peccato delicto vel pluribus ante degradationem perpetratus.*

Thirdly, If the Clerk was convicted of any Felony, except Murder, he might then demand the Benefit of Clergy, and so they permitted any Person to do that could read, and such Person was permitted to make Purgation before his Ordinary, and if he purged himself, he was acquitted.

But if the Clerk confessed the Fact, he was delivered to the Ordinary *absque Purgatione*, for he having confessed the Fact, could not deny it afterwards before the Ordinary.

To understand the Reasons of these Distinctions, we must consider what is formerly laid down, that in Case of Blood by the Common Law, the Ecclesiastical Court had no Jurisdiction, and therefore when the Clerk was convicted, he could not be delivered to the Ecclesiastical Court to make Purgation, because they had no Cognizance of the Cause; but he was delivered to them *absque Purgatione*, in Order to be degraded by them, and the Sentence of the Common Law was *deliberetur Ordinario absque Purgatione eo fleta (Q) si criminaliter agatur versus Clericum; Quamvis Clericus respondere noluerit in foro seculari Judex tamen Ecclesiasticus cognitionem habere non poterit nec Regiam auferre Jurisdictionem licet habere debeat Judicii executionem; in causa enim Sanguinis non poterit Ecclesiasticus Judex cognoscere neq; judicare nisi irregularitatem committat & quamvis neminem valeat morti condemnare, degradare tamen poterit crimine convicti & perpetua carceris inclusione custodire.* Upon such Delivery, the Ordinary not only degraded him, but put him in Prison 'till he obtained the King's Pardon.

But if the Ordinary demanded him for a Clerk that was not so, he lost his Temporality, because it was impeaching the Temporal Jurisdiction.

But in all Cases, except Treason and Murder, the Clerk might himself demand his Privilege, and then he was delivered to the Ordinary, without any Restriction; and by the Law of the Church, he was to purge himself of that Crime by his own Oath, confirmed with 12 Compurgators, six of which were Lay, and the other six Clerks; and if he failed in his Purgation, he was punished as if he had been convicted, or had confessed the Crime.

When he failed in his Purgation, the Ordinary judged if he was corrigible or incorrigible; if the former, they imposed Penance, and on his Performance or Commutation he was absolved; if the latter, he was deprived and imprisoned.

By the Canon Law, if the Criminal was notorious, they proceeded to Sentence, *absq; purgatione super notorio nulli erit induenda purgatio sc' tantum condemnationis promulganda sententia cum patrati sceleris evidentia neq; accusationis clamore indigeat.*

The Temporal Court taking Notice of the Canon Law, and likewise that the Ordinary could not take Notice of the Judgment of their Court, when a Person became infamous by a second Offence, they were wont to deliver him *absq; Purgatione*, and therefore an infamous Thief was so delivered.

By the 4th of *Hen. 4. Cap.* it is enacted, that a Clerk that was a Traitor or infamous, should be delivered to them *absq; Purgatione*.

But as the Clergy had notoriously abused their Privilege, it is enacted that none but Persons in Orders shall have the Benefit of their Clergy above once, and the Murtherer shall be marked with an *M.* and the Felon with an *F.* and that Persons in Orders demanding their Clergy, shall shew their Orders at the Day given by the Court.

By the 28th of *Hen. 8. Cap. 11.* and 32 *Hen. 8. Cap. 3.* Persons in Orders shall receive the Benefit of Clergy but once.

By 18 *El. Cap. 7.* the Persons admitted to the Benefit of Clergy shall not be delivered to the Ordinary, but enlarged out of Prison by the Justices.

From the Time of *Hen. 7.* the Benefit of Clergy has been taken away in several Particulars, *Vid.* the Statutes.

By the 12th of *Hen. 7.* it is taken away from any Person, except Persons in Orders in Petty Treason, Murder, Sacrilege, Robbery and House-breaking, and their Accessories; and a Clerk in Orders ought not to be admitted to his Purgation, or be enlarged by the Ordinary for any of these Offences, 'till bound to the Good Behaviour.

23 *Hen. 8. Cap. 11.* the convict Person in Orders to be delivered to the Ordinary without Purgation, who may degrade him, and send him back to the Kings Bench, and there to be proceeded upon.

N. B. This was the Argument of the Lord Chief Baron Gilbert, on Occasion of a Murder in *Ireland.*

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T A B L E

O F T H E

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